property passing to the QDOT, and H's estate is allowed a marital deduction of $2,000,000 under section 2056(d) for the value of that property. H's taxable estate is $1,000,000. On H's estate tax return, H's executor computes H's preliminary DSUE amount to be $4,000,000. No taxable events within the meaning of section 2056A occur during W's lifetime with respect to the QDOT. W makes a taxable gift of $1,000,000 to X in December 2011 and a taxable gift of $1,000,000 to Y in January 2012. W dies in September 2012, not having married again, when the value of the assets of the QDOT is $2,200,000.

(ii) *Application.* H's DSUE amount is redetermined to be $1,800,000 (the lesser of the $5,000,000 basic exclusion amount in 2011, or the excess of H's $5,000,000 applicable exclusion amount over $3,200,000 (the sum of the $1,000,000 taxable estate augmented by the $2,200,000 of QDOT assets)). On W's gift tax return filed for 2011, W cannot apply any DSUE amount to the gift made to X. However, because W's gift to Y was made in the year that W died, W's executor will apply $1,000,000 of H's redetermined DSUE amount to the gift on W's gift tax return filed for 2012. The remaining $800,000 of H's redetermined DSUE amount is included in W's applicable exclusion amount to be used in computing W's estate tax liability.

(e) *Authority to examine returns of deceased spouses.* For the purpose of determining the DSUE amount to be included in the applicable exclusion amount of the surviving spouse, the Internal Revenue Service (IRS) may examine returns of each of the surviving spouse's deceased spouses whose DSUE amount is claimed to be included in the surviving spouse's applicable exclusion amount, regardless of whether the period of limitations on assessment has expired for any such return. The IRS's authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on such a return; however, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under section 6501 applicable to the tax shown on that return. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry.

(f) *Availability of DSUE amount for nonresidents who are not citizens.* A nonresident surviving spouse who was not a citizen of the United States at the time of making a transfer subject to tax under chapter 12 of the Internal Revenue Code shall not take into account the DSUE amount of any deceased spouse except to the extent allowed under any applicable treaty obligation of the United States. See section 2102(b)(3).

(g) *Effective/applicability date.* This section applies to gifts made in calendar year 2011 or in a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

(h) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 11.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 12.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR Part or section where identified and described	Current OMB Control No.
* * * * *	
20.2010–2T	1545–0015
* * * * *	

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: June 12, 2012.

Emily S. McMahon,

Acting Assistant Secretary of Treasury (Tax Policy).

[FR Doc. 2012–14781 Filed 6–15–12; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2011–0956; FRL–9682–7]

Determinations of Failure To Attain the One-Hour Ozone Standard by 2007, Current Attainment of the One-Hour Ozone Standard, and Attainment of the 1997 Eight-Hour Ozone Standards for the New York-Northern New Jersey-Long Island Nonattainment Area in Connecticut, New Jersey and New York

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing four separate and independent determinations related to the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour and 1997 eight-hour ozone nonattainment areas. The boundaries of the one-hour and eight-hour ozone nonattainment areas differ slightly. With respect to the NY-NJ-CT one-hour nonattainment area, EPA is determining that the area previously failed to attain the one-hour ozone National Ambient Air Quality Standard (NAAQS) by its applicable attainment deadline of November 15, 2007 (based on complete, quality-assured and certified ozone monitoring data for 2005–2007), and EPA is also determining that the area is currently attaining the now revoked one-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008–2010.

Quality-assured ozone monitoring data in the Air Quality System for 2011 indicate the area continues to attain the revoked one-hour ozone standard. With respect to the NY-NJ-CT 1997 eight-hour ozone nonattainment area, EPA is determining that the area attained the 1997 eight-hour ozone standard by the applicable deadline, June 15, 2010, based on complete, quality-assured and certified ozone monitoring data for 2007–2009. EPA is also determining that the area is currently attaining the 1997 eight-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008–2010. Quality-assured ozone monitoring data for 2011 indicate that the area continues to attain the 1997 eight-hour ozone standard.

EPA's ozone implementation regulation for the 1997 eight-hour ozone standard provides that the requirements for the States to submit certain reasonable further progress plans, attainment demonstrations, contingency measures and any other planning requirements of the Clean Air Act related to attainment of that ozone standard shall be suspended for as long as the area continues to attain the standard. A determination of attainment does not constitute a redesignation to attainment. Redesignation requires the states to meet a number of additional criteria, including EPA approval of a state plan to maintain the air quality standard for ten years after redesignation.

DATES: *Effective Date:* This rule is effective on July 18, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R02–OAR–2011–0956. All

documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not 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 *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 212–637–4249.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning EPA's action related to New Jersey or New York, please contact Paul Truchan, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th floor, New York, New York 10008–1866, telephone number (212) 637–4249. If you have questions concerning EPA's action related to Connecticut, please contact Richard Burkhart, Air Quality Planning Unit, Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, Mail Code OEP05–02, Boston, MA 02109–3912, telephone number (617) 918–1664, fax number (617) 918–0664, email *burkhart.richard@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What are the actions EPA is taking?

EPA is finalizing four separate and independent determinations for the New York-Northern New Jersey-Long Island (NY-NJ-CT) ozone nonattainment area (hereafter, ''the NY-NJ-CT area'').

A. Determination of Failure To Attain the One-Hour Ozone Standard by Applicable Attainment Date

EPA is determining that the NY-NJ-CT one-hour ozone nonattainment area previously failed to attain the one-hour ozone National Ambient Air Quality Standard (NAAQS) by its applicable attainment deadline of November 15, 2007 (based on complete, quality-assured and certified ozone monitoring data for 2005–2007).

B. Determination of Current Attainment of the One-Hour Ozone Standard

EPA is determining that the NY-NJ-CT one-hour ozone nonattainment area is currently attaining the one-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008–2010. Quality-assured ozone monitoring data for 2011 in the Air Quality System (AQS) indicate the area continues to attain the one-hour ozone standard.

C. Determination of Attainment of the 1997 Eight-Hour Ozone Standard by Applicable Attainment Date

EPA is determining that the NY-NJ-CT eight-hour ozone nonattainment area attained the 1997 eight-hour standard by the applicable deadline, June 15, 2010, based on complete, quality-assured and certified ozone monitoring data for 2007–2009.

D. Determination of Continued Attainment of the 1997 Eight-Hour Ozone Standard

EPA is determining that the area is currently attaining the 1997 eight-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008–2010. Quality-assured data available in the AQS for 2011 indicate that the area continues to attain the 1997 eight-hour ozone standard. Based on the determination that the area is currently attaining the 1997 eight-hour standard, 40 CFR 51.918 [1] of EPA's ozone implementation rule for the 1997 eight-hour ozone standard provides that the requirements for the States to submit certain reasonable further progress plans, attainment demonstrations, contingency measures and any other planning requirements of the Clean Air Act related to attainment of that standard shall be suspended for as long as the area continues to attain the standard. Quality-assured ozone monitoring data for 2011 in AQS indicate the area continues to attain the 1997 eight-hour ozone standard.[2]

In addition, EPA is withdrawing EPA's proposed disapprovals of Connecticut's and New Jersey's 1997 eight-hour ozone attainment demonstrations, which were previously published in the **Federal Register** on May 8, 2009 (74 FR 21568 and 74 FR 21578).

In order to determine the areas' air quality status for purposes of this action, EPA reviewed ozone monitoring air quality data from the States, in accordance with 40 CFR 50.9, 40 CFR part 50 appendix H and appendix I, and EPA policy and guidance, as well as data processing, data rounding and data completeness requirements. EPA's review of the air quality data and related rationale for these determinations are explained in the Notice of Proposed Rulemaking (NPR) published in the **Federal Register** on January 25, 2012 (77 FR 3720) and will not be restated here.

II. What is the background for these actions?

The boundaries for the NY-NJ-CT one-hour and the eight-hour ozone nonattainment areas are slightly different. For the one-hour ozone NAAQS of 0.12 parts per million (ppm), the area is composed of: Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Ocean, Passaic, Somerset, Sussex, and Union Counties in New Jersey; Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, Westchester Counties and part of Orange County in New York; and parts of Fairfield and Litchfield Counties in Connecticut. The 1997 eight-hour ozone nonattainment area is composed of many of the same counties as the one-hour ozone nonattainment area but does not include Ocean County in New Jersey, any part of Orange County in New York or any part of Litchfield County in Connecticut, and does include Warren County in New Jersey, and all of Fairfield, New Haven and Middlesex Counties in Connecticut. The one-hour ozone standard designations were established by EPA following the enactment of the Clean Air Act (CAA) Amendments in 1990. See 56 FR 56694 (November 6, 1991). Each area of the country that was

[1] CFR refers to the Code of Federal Regulations, in this case Title 40 part 51.

[2] Greenwich Point Park, Connecticut (AQS 090010017) an ozone monitor in the New York-Northern New Jersey-Long Island one-hour and 1997 eight-hour ozone nonattainment areas was taken out of service on August 28, 2011 in an attempt to protect the site from the prediction of the landfall of Hurricane Irene, at or near New York City, New York. In the end, the Hurricane storm surge and/or storm driven waves did submerge an electric meter box, servicing the ozone monitor. The meter box was replaced and power was restored by January 4, 2012. The result of this power outage was the loss of ozone data from August 28 to September 30, 2011. As a result of this loss of data, the Greenwich Point Park ozone monitor fell just short of 75 percent data completeness required. Nevertheless, all available 2011 ozone data indicate New York-Northern New Jersey-Long Island one-hour and 1997 eight-hour ozone nonattainment areas continue in attainment for both the 1-hour and 8-hour ozone standards in 2011. Monitoring data for all other monitors in the area for the states of New York and Connecticut are certified as complete and indicated attainment of both standards. The ozone data for New Jersey is in AQS, is quality assured, and is complete, but as of May 4, 2012 the NJ ozone data have not yet been certified.

designated nonattainment for the one-hour ozone NAAQS was classified by operation of law as marginal, moderate, serious, severe, or extreme depending on the severity of the area's air quality problem. See CAA sections 107(d)(1)(C) and 181(a). The NY-NJ-CT one-hour ozone nonattainment area was designated nonattainment and classified as severe-17, with an attainment deadline of November 15, 2007.

On July 18, 1997, (62 FR 38856), EPA promulgated a new, more protective standard for ozone based on eight-hour average concentrations (the ''1997 eight-hour ozone NAAQS''). EPA designated and classified most areas of the country under the eight-hour ozone NAAQS in an April 30, 2004 final rule (69 FR 23858). The NY-NJ-CT 1997 eight-hour ozone nonattainment area was designated nonattainment and classified as moderate with an attainment deadline of June 15, 2010.

On April 30, 2004, EPA also issued a final rule (69 FR 23951) entitled ''Final Rule To Implement The 8-hour Ozone National Ambient Air Quality Standard—Phase 1,'' referred to as the Phase 1 Rule. Among other matters, this rule revoked the one-hour ozone NAAQS in most areas of the country, effective June 15, 2005. See, 40 CFR 50.9(b); 69 FR 23996; and 70 FR 44470 (August 3, 2005). The Phase 1 Rule also set forth how anti-backsliding principles will ensure continued progress toward attainment of the eight-hour ozone NAAQS by identifying which one-hour ozone requirements remain applicable in an area after revocation of the one-hour ozone NAAQS.

Although EPA revoked the one-hour ozone standard (effective June 15, 2005), eight-hour ozone nonattainment areas remain subject to certain one-hour anti-backsliding requirements based on their one-hour ozone classification. Initially, EPA's rules to address the transition from the one-hour to the eight-hour ozone standard did not include one-hour nonattainment area contingency measures or major source penalty fee programs among the measures retained as one-hour ozone anti-backsliding requirements.[3] However, on December 23, 2006, the United States Court of Appeals for the District of Columbia Circuit determined that EPA should not have excluded these requirements (and certain others not relevant here) from its anti-backsliding requirements. *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) reh'g denied 489 F.3d 1245 (clarifying that the vacatur was limited to the issues on which the court granted the petitions for review). Thus, the Court vacated the provisions that excluded these requirements. As a result, states must continue to meet the obligations for one-hour ozone NAAQS contingency measures. EPA has issued a rule that, among other things, removed the vacated provisions of 40 CFR 51.905(e), and addressed the anti-backsliding requirement for contingency measures for failure to attain or make reasonable further progress toward attainment of the one-hour standard. See 74 FR 2936 (January 16, 2009) (proposed rule); 74 FR 7027 (February 12, 2009) (notice of public hearing and extension of comment period), and 77 FR 28424 (May 14, 2012) (final rule).

[3] Final Rule to Implement The 8-Hour Ozone National Ambient Air Quality Standard—Phase 1, 69 FR 23951 (April 30, 2004).

III. What comments were received on these actions and what are EPA's responses?

EPA received six distinct comments from three parties: the New Jersey Department of Environmental Protection (NJDEP), Public Service Enterprise Group, Inc. (PSEG) and Sierra Club. No adverse comments were directed at EPA's monitoring data-based air quality determinations, in and of themselves. One commenter (Sierra Club) submitted adverse comments concerning EPA's discussion of certain regulatory effects and consequences of these determinations. Below, EPA summarizes those comments and sets forth EPA's responses.

1. Two commenters (NJDEP and PSEG) urged EPA to determine that the section 185 fee requirement under the one-hour standard for the NY-NJ-CT nonattainment area is no longer applicable to the nonattainment area because the area attained the one-hour standard. One commenter (PSEG) alternatively suggested EPA issue a Termination Determination for the section 185 fee requirement based upon the complete, quality-assured monitoring data showing attainment with the one-hour ozone NAAQS in the area due to permanent and enforceable emission reductions implemented in the area. The commenter contended that such a Termination Determination would not be dependent upon the Agency's previous section 185 fee guidance, which was vacated by the D.C. Circuit Court, but would instead be consistent with the statutory objectives of section 185 and the reasoning of the Court in *South Coast Air Quality Management District* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006) (*South Coast*). Sierra Club, in its comments, requested that EPA apply section 185 requirements for the period from 2007–2010.

Response: On January 29, 2011, April 29, 2011 and June 16, 2011, the Departments of Environmental Protection for the States of New Jersey, Connecticut and New York, respectively, requested that EPA make a determination that the NY-NJ-CT area has attained the 1-hour ozone standard due to permanent and enforceable emissions reductions, and that therefore the States should be relieved of any obligation to implement the penalty fees for that area under section 185. EPA is considering these requests and will take separate notice and comment rulemaking shortly to address them. EPA has not yet proposed any action on these requests and thus cannot take any final action with respect to them in this rulemaking.

EPA in this rulemaking is finalizing its determination that the area has attained the 1-hour ozone standard based on certified air quality data for 2008–2010, and continuing through 2011. No commenter has requested that EPA require the States to implement the section 185 penalty fee program in this area in the period subsequent to the area's attainment of the 1-hour standard in 2010. Below, EPA addresses one commenter's (Sierra Club) contentions with respect to requiring penalty fees for the period prior to 2010. EPA will be addressing any remaining issues with respect to terminating one-hour ozone section 185 penalty fee requirements in this area in future rulemaking actions.

2. A commenter (Sierra Club) contends that EPA has no authority to withdraw its proposed disapprovals of the 1997 eight-hour ozone attainment demonstration for the NY-NJ-CT eight-hour nonattainment area. The commenter cites 42 U.S.C. 7410(k)(2) and (3) as requiring EPA to act within 12 months of a finding of completeness. Also, commenter asserts that a determination of attainment (Clean Data Determination) does not and cannot suspend EPA's obligation to approve or disapprove a SIP submission after it has been submitted to EPA.

Response: Assuming that, in a situation where EPA has already conducted notice and comment rulemaking to determine that an area is in attainment of the standard, the Agency is nevertheless obliged to conduct additional rulemaking on a plan to accomplish what has been done, under section 110(k)(2), EPA is not obligated to finalize a prior version of a proposed rulemaking on the plan after circumstances have changed. In this case, EPA's determination, after notice and comment rulemaking, that the area

attained the 1997 eight-hour ozone NAAQS by its attainment date, eliminates the basis for the prior proposed disapproval. Under these circumstances, it is reasonable, proper and correct for EPA to withdraw the proposed disapproval. EPA may then proceed to take into account the determination that the area has attained, in a subsequent proposed action to approve the submitted attainment demonstration SIPs. Alternatively, in view of EPA's final determination of attainment for the area, the States of Connecticut and New Jersey may choose to withdraw their attainment demonstrations. Thus, the commenter's concerns are misplaced. Withdrawal of the proposed disapprovals is consistent with, and in no way prohibits further action with respect to the attainment demonstrations in accordance with the EPA's determination that the monitoring data show the area has attained the 1997 eight-hour standard since 2009.

3. A commenter (Sierra Club) argues that the NY-NJ-CT area's failure to attain the one-hour ozone NAAQS by its deadline of November 15, 2007 triggers penalty fees for 2007–2010 and contingency plan requirements under the Clean Air Act.

A. Sierra Club states that the NY-NJ-CT nonattainment area did not attain by its November 15, 2007 attainment date, and cites *South Coast,* 472 F.3d at 903, in support of its position that EPA must enforce certain anti-backsliding requirements, including section 185 fees. The commenter complains that EPA in its proposed determination of nonattainment for the NY-NJ-CT area (see 77 FR 3724) did not require payment of fees for 2007–2010.

Response: First, we wish to emphasize, as EPA stated in its proposal, that the purpose of this rulemaking action is to make four specific air quality determinations regarding whether the NY-NJ-CT area attained the one-hour and 1997 eight-hour ozone standards. While EPA's proposal noted that these determinations bear on one-hour anti-backsliding requirements for contingency measures and section 185 penalty fees, this action does not attempt to address or resolve all the implementation issues regarding those requirements. Thus at the outset, Sierra Club's position that EPA's specific rulemakings on air quality determinations must also include resolutions of all anti-backsliding implementation issues that may flow from them is incorrect. While EPA recognizes that the anti-backsliding requirement for the one-hour contingency measures and section 185 fees are linked to the determination of failure to meet the attainment deadline for that standard, EPA's rulemakings here regarding those determinations do not, and are not required to, dispose of all implementation issues for those requirements or for others, such as those raised in Sierra Club's comments regarding milestones and additional planning.

In its comments, Sierra Club argues that EPA's determination that the NY-NJ-CT area failed to attain by its one-hour ozone attainment deadline also requires EPA to decide here that it must retroactively collect penalties under section 185 for the period before EPA made its determination.[4] We disagree. Neither EPA's determination, nor the *South Coast* case, compels EPA to reach this conclusion or even to decide that issue here. EPA intends to address issues regarding one-hour anti-backsliding requirements in future rulemakings on implementation of the section 185 requirements for the NY-NJ-CT area. Nevertheless, we wish to state our preliminary views on Sierra Club's comments below. EPA's preliminary views are set forth in the remainder of the response below, and are not necessary to and are independent of its air quality determinations of attainment contained in this final rulemaking.

Sierra Club's comments quote at length from *South Coast, 472 F.3d at 902–903.* While EPA acknowledges that this decision established that section 185 fee requirements were to be included as anti-backsliding measures, the Court in that case did not direct any specific means of enforcement of these requirements, nor the method for determining whether an area failed to attain by its attainment date. That decision established only that the section 185 and contingency measure requirements were ''applicable.'' It did not establish or even address how those requirements were to be implemented.[5]

The D.C. Circuit, however, has previously upheld EPA's longstanding practice of making determinations of an area's failure to meet attainment deadlines solely through notice and comment rulemaking—*Sierra Club* v. *Whitman, 285 F.3d 63 (D.C. Cir. 2002).*[6] In that case—which similarly arose from a determination of failure of a one-hour ozone nonattainment area to meet its attainment deadline, the D.C. Circuit rejected a litigant's[7] demand to make the consequences of that determination retroactive to the time period before EPA made the determination. In that case, Sierra Club similarly argued that EPA's overdue determination that the St. Louis one-hour ozone nonattainment area failed to attain by its attainment deadline should apply retroactively, and that the Court should require retroactive reclassification of the area. The Court rejected Sierra Club's contention that EPA's rulemaking was not required to determine a failure to attain: ''No matter what the Sierra Club thinks the Clean Air Act or the APA required of EPA, the fact remains that 'EPA's established practice for making a final decision concerning nonattainment and reclassification is to conduct a rulemaking under the APA, not to issue a letter, a list, or some other informal document.' * * * [citations omitted.]'' The Court concluded: ''In other words, if there has not been a rulemaking there has not been an attainment determination.'' *285 F.3d at 66.*

The Court also refused to accept Sierra Club's assertion that the Court should compel EPA to give retroactive effect to its determination, resulting in reclassification as of the area's attainment date. The Court stated: ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans [earlier], even though they were not on notice at the time.'' *285 F.3d at 68.*

While it is true that the Clean Air Act provides that both reclassification and penalty fees are consequences of failure to attain the ozone standard, the D.C. Circuit in *Sierra Club* recognized that these weighty consequences are not triggered until EPA makes a determination, after notice and comment rulemaking, of failure to attain. In that case the court also rejects

[4] As explained above and elsewhere in our response to comments, EPA disagrees with Sierra Club's contentions regarding retroactive collection of fees. As a technical point, however, we note that under section 185, the earliest year for which fees could ever have been required to be paid is the calendar year following the attainment date, November 15, 2007. Thus, it is clear that under no circumstances would fees be due for 2007.

[5] Moreover, as EPA explained above, those issues are ancillary to the determination of failure to attain the one-hour ozone standard that EPA is finalizing in this rulemaking.

[6] Sierra Club v. Whitman was discussed and distinguished in a recent D.C. Circuit decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n* v. *EPA.* 630 F.3d 145, 163 (D.C. Cir. 2010), *rehearing denied* 643 F.3d 958 (D.C. Cir. 2011), *cert denied* 132 S. Ct. 571 (2011).

[7] In this case, also Sierra Club.

the view that adverse consequences from the determination should be imposed retroactively, especially if they would, as here, subject the States to additional burdens caused by retroactive requirements that were not triggered prior to conclusion of the rulemaking process.

Several features of our rulemaking for the NY-NJ-CT area provide additional grounds for application of a position similar to that which the court took in the St. Louis Sierra Club case. In the case of St. Louis, when the question of retroactive application arose, the area remained in nonattainment of the one-hour standard, which was also still the only standard in effect. Here, unlike St. Louis, EPA has determined that the NY-NJ-CT area is currently attaining both the one-hour and eight-hour standards, and thus there is significantly less reason to consider imposing retroactive penalties that are intended to bring about the attainment that has already occurred.

Sierra Club here argues, unpersuasively, that the *South Coast* opinion supports retroactive imposition of penalties, quoting the Court's statement that, unless section 185 requirements were applicable, ''a state could go unpenalized without ever attaining even the original NAAQS * * *.'' *472 F.3d at 903.* Here, however, this possibility does not exist. EPA's final determinations in this rulemaking establish that the NY-NJ-CT area has in fact attained not only the original one-hour standard, but also the 1997 eight-hour NAAQS.

Sierra Club quotes the Court's statement in *South Coast* that ''Congress set the penalty deadline well into the future, giving states and industry ample notice and sufficient incentives to avoid the penalties.'' *372 F.3d at 903.* Notice of the existence of penalty provisions, however, is not the same as notice that these provisions have been triggered. As the D.C. Circuit recognized in *Sierra Club* v. *EPA,* only when EPA issues a final notice determining that an area has failed to attain by the attainment date can that failure be definitively established. The case of the NY-NJ-CT area presents a particularly compelling context in which to apply this principle. The NY-NJ-CT area has been attaining the one-hour standard since 2010 and the eight-hour standard for the time period 2007–2010, and data for 2011 continues this trend. No incentives—and certainly no penalties—are required for the area to reach attainment,[8] a goal that the area has met, preserved and exceeded. Under these circumstances, and based on the D.C. Circuit's and EPA's long held position on the issue of retroactive consequences of determinations of failure to attain, EPA cannot see a reason to impose penalties on sources in the NY-NJ-CT area. As explained above, EPA is determining that the area is currently, and has for some time been, attaining both the one-hour and eight-hour ozone standards. Thus no anti-backsliding purpose is served by retroactive imposition of fees for a failure to meet a deadline for a revoked standard—under circumstances that existed years ago, which have since been eclipsed by continuous attainment. EPA believes that compelling the States and sources to address old penalties now would also divert attention and resources from efforts to achieve current, forward-looking environmental goals, including the stricter 2008 ozone standard. In these circumstances, giving retroactive effect to EPA's determination of failure to attain the standard here would be unreasonable, and it would, as the Court held in *Sierra Club* v. *Whitman,* ''only mak[e] the situation worse.''

B. Sierra Club asserts that the NY-NJ-CT nonattainment area is subject to contingency plan requirements for failure to attain the one-hour standard and that EPA failed to impose this requirement on the States. Sierra Club argues that EPA must ensure that the contingency measures approved for New York, New Jersey, and Connecticut in 67 FR 5170, 67 FR 5152, and 66 FR 63921 are implemented and enforced, and Sierra Club contends that EPA has improperly failed to carry out this obligation. Sierra Club asserts that EPA's determination that the area has attained the one-hour ozone standard (Clean Data Determination) does not allow removal of these contingency measures, which Sierra Club states became applicable in 2007 and which must remain in place to prevent backsliding.

Response: Contingency measures for the one-hour ozone standard were previously approved and have been implemented in the NY-NJ-CT nonattainment area. See for New York: 67 FR 5170 (February 4, 2002) and 40 CFR 52.1683(i)(3); for New Jersey: 67 FR 5152 (February 4, 2002) and 40 CFR 52.1582(h)(4); for Connecticut: 66 FR 63921 (December 11,2001) and 40 CFR 52.377. There is no need for EPA to require the states to implement the contingency measures, because all the identified measures are part of the applicable SIP and have already been implemented. The States have not requested removal of the contingency measures from their respective SIPs and therefore they continue in effect. EPA has never proposed to remove the measures approved as contingency measures in this area. The States would have to request a SIP revision if they wanted to remove these measures from their applicable SIP and would have to demonstrate compliance with section 110(l). Thus, the measures identified as contingency measures continue to remain in SIP. Moreover, as explained in EPA's Clean Data Policy,[9] the purpose of contingency measures for failure to attain is linked to attainment. EPA in this rulemaking has determined that the area has already attained the one-hour ozone standard, and therefore no additional contingency measures are needed.

C. Sierra Club argues that the NY-NJ-CT ozone nonattainment area is subject to the milestone one-hour ozone anti-backsliding requirements of the Act. The commenter asserts that EPA errs in failing to impose rate of progress (ROP) or reasonable further progress (RFP) milestones on the nonattainment area. The commenter asserts that 42 U.S.C. 7511(d) requires the states to submit revised SIPs that incorporate updated ROP plans for the one-hour ozone standard.

Response: As stated in the proposed rulemaking, EPA has previously approved one-hour RFP and ROP plans for the NY-NJ-CT area. See for New York: 67 FR 5170 February 4, 2002 and 40 CFR 52.1683(i)(2); for New Jersey: 67 FR 5152 February 4, 2002 and 40 CFR 52.1582(h)(3); for Connecticut: 66 FR 63921 December 11, 2001 and 40 CFR 52.377. Nowhere in its January 25, 2012 proposal (77 FR 3720), did EPA propose to remove from the approved SIPs the measures that resulted in satisfying the ROP or RFP plan requirements for the area. Nor have the States requested removal of those provisions.

Sierra Club's comment relies on section 181(b)(4)(A), and quotes language providing that, if a severe area fails to attain, certain reductions continue '' until the standard is attained.'' Here, EPA's determinations in this rulemaking establish that the area has attained the one-hour ozone standard, so any such obligation would now be at an end. And, as explained in

[8] Sierra Club appears to recognize this, since it does not request EPA to impose penalties for the time period after the area attained the standard (2010 to the present).

[9] Memorandum from John S. Sietz, Director, OAQPS, dated May 10, 1995, entitled ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard'' (''Clean Data Policy'').

Comment 3A, no prior failure to attain was established until EPA's final determination in this rulemaking (see response to Comment 3A above). In this rulemaking, EPA is finalizing its determinations that the NY-NJ-CT nonattainment area is currently attaining both the one-hour and eight-hour ozone NAAQSs. Under 40 CFR 51.918 and the interpretation set forth in EPA's longstanding Clean Data Policy, these determinations suspend the obligations to submit any outstanding planning requirements, including ROP. Based on the monitoring data that show attainment of both ozone standards, there is no need to require the States to revise or submit new ROP plans or new RFP milestones for the one-hour ozone SIPs. Additional ozone reductions have resulted from implementation of the eight-hour ozone standard. EPA has approved ROPs for the 1997 ozone standard SIPs in Connecticut, New Jersey and New York, which function to further reduce ozone precursors to a greater extent than would be required by submission of an additional RFP for the one-hour ozone standard.

4. Sierra Club contends that the NY-NJ-CT ozone nonattainment area must submit a revised one-hour ozone SIP and asserts that EPA's failure to require a new SIP for the NY-NJ-CT area upon finalizing its proposed determination of nonattainment is improper and contrary to law.

Response: We disagree that EPA's determination here that the NY-NJ-CT area failed to attain the one-hour ozone standard triggers any CAA section 179(d) requirement to prepare and submit SIP revisions. A new section 179(d) ozone plan, triggered by section 179(c) is not an applicable anti-backsliding requirement under EPA's anti-backsliding regulations. As EPA has explained in other rulemakings, only those anti-backsliding requirements that were specifically retained are applicable, and the requirements of section 179(c) and (d) are not included. See 76 FR 82133 (December 30, 2011). As EPA stated in its proposal, the only anti-backsliding measures that pertain to this determination of failure to meet the one-hour deadline are one-hour contingency measures for failure to attain and section 185 penalty fees.

Moreover, under EPA's Clean Data Policy EPA's determination that the area is currently attaining the one-hour ozone standard obviates the need for submission of any planning requirements related to attainment of the standard.

IV. Final Actions

EPA is making four separate and independent determinations related to the NY-NJ-CT one-hour and 1997 eight-hour ozone nonattainment areas. These determinations are based upon complete, quality-assured and certified ozone monitoring data. First, with respect to the one-hour ozone standard, and pursuant to EPA's authority to ensure implementation of one-hour ozone anti-backsliding requirements and CAA section 301, EPA is determining that data for 2005–2007 show that the NY-NJ-CT area previously failed to attain the one-hour ozone standard by its applicable November 15, 2007 attainment deadline. Second, and more importantly, EPA is determining that the NY-NJ-CT area is currently attaining the one-hour ozone standard, based on more recent complete, quality-assured and certified data for 2008–2010. Quality-assured ozone monitoring data in the AQS for 2011 indicate the area continues to attain the revoked one-hour ozone standard.

Third, with respect to the 1997 eight-hour ozone standard, in accordance with section 181(b) of the CAA, EPA is determining that complete, quality-assured and certified ozone monitoring data for 2007–2009 show the NY-NJ-CT eight-hour ozone nonattainment area attained the 1997 eight-hour ozone standard by its June 15, 2010 attainment deadline. Fourth, EPA is also determining that the NY-NJ-CT eight-hour ozone nonattainment area currently continues to attain the eight-hour ozone NAAQS, based on complete, quality-assured and certified data for 2008–2010. Quality-assured ozone monitoring data in the AQS for 2011 indicate the area continues to attain the 1997 eight-hour ozone standard.

As provided in 40 CFR 51.918, EPA's determination that the area has attained the eight-hour ozone standard suspends the requirements under section 182(b)(1) for submission of the attainment demonstration, reasonable further progress plan, contingency measures and any other planning SIP relating to attainment of the 1997 eight-hour NAAQS. This suspension of requirements is effective for so long as the area continues to attain the 1997 eight-hour ozone standard.

For the reasons stated in its proposed notice and response to comments here, EPA is also withdrawing the May 8, 2009 proposed disapprovals of Connecticut's and New Jersey's eight-hour ozone attainment demonstrations for the NY-NJ-CT eight-hour ozone nonattainment area.

V. Statutory and Executive Order Reviews

These actions, make attainment determinations based on air quality and result in the suspension of certain Federal requirements, will not impose additional requirements beyond those imposed by state law, or will not impose any requirements beyond those required by Federal statute. For these reasons, these actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides

that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 August 17, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen oxides, Ozone, Volatile organic compounds, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 15, 2012.

Judith A. Enck,

Regional Administrator, Region 2.

Dated: May 27, 2012.

H. Curtis Spalding,

Regional Administrator, Region 1.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart H—Connecticut

■ 2. Section 52.377 is amended by adding paragraphs (j) and (k) to read as follows:

§ 52.377 Control strategy: Ozone.

* * * * *

(j) Determination of Attainment for the One-Hour Ozone Standard. Effective July 18, 2012, EPA is determining that the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour ozone nonattainment area did not meet its applicable one-hour ozone attainment date of November 15, 2007, based on 2005–2007 complete, quality-assured and certified ozone monitoring data. Separate from and independent of this determination, EPA is determining that the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour ozone nonattainment area has attained the one-hour ozone standard, based on 2008–2010 complete, quality-assured and certified ozone monitoring data at all monitoring sites in the area and data showing the area continued to attain through 2011.

(k) Determination of Attainment for the Eight-Hour Ozone Standard. Effective July 18, 2012 EPA is determining, that complete, quality-assured and certified ozone monitoring data for 2007–2009 show the NY-NJ-CT eight-hour ozone nonattainment area attained the 1997 eight-hour ozone standard by its June 15, 2010 attainment deadline. Therefore, EPA has met the requirement pursuant to CAA section 181(b)(2)(A) to determine, based on the area's air quality data as of the attainment date, whether the area attained the standard. EPA also determined that the NY-NJ-CT nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 181(b)(2)(A). EPA is also determining that the NY-NJ-CT eight-hour ozone nonattainment area currently continues to attain the eight-hour ozone NAAQS, based on complete, quality-assured and certified data for 2008–2010 and data through 2011. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 annual eight-hour ozone NAAQS.

Subpart FF—New Jersey

■ 3. Section 52.1576 is amended by designating the existing text as paragraph (a), adding and reserving paragraph (b), and adding new paragraphs (c) and (d) to read as follows:

§ 52.1576 Determinations of attainment.

* * * * *

(c) Based upon EPA's review of the air quality data for the three-year period 2005 to 2007, EPA determined, as of June 18, 2012, that the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour ozone nonattainment area did not meet its applicable one-hour ozone attainment date of November 15, 2007. Separate from and independent of this determination, based on 2008–2010 complete, quality-assured ozone monitoring data at all monitoring sites in the area, and data for 2011, EPA determined, as of June 18, 2012, that the NY-NJ-CT one-hour ozone nonattainment area has attained the one-hour ozone standard.

(d) Based upon EPA's review of complete, quality-assured and certified air quality data for the three-year period 2007 to 2009, and data for 2011, EPA determined, as of June 18, 2012, that the New York-Northern New Jersey-Long Island (NY-NJ-CT) eight-hour ozone moderate nonattainment area attained the 1997 eight-hour ozone NAAQS by the applicable attainment date of June 15, 2010. Therefore, EPA has met the requirement pursuant to CAA section 181(b)(2)(A) to determine, based on the area's air quality data as of the attainment date, whether the area attained the standard. EPA also determined that the NY-NJ-CT nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 181(b)(2)(A).

■ 4. Section 52.1582 is amended by designating paragraph (n) as paragraph (n)(1), and adding new paragraph (n)(2) to read as follows:

§ 52.1582 Control strategy and regulations: Ozone.

* * * * *

(n) *Attainment determination.* (1) * * *

(2) EPA has determined, as of June 18, 2012, that based on 2007 to 2009 complete, quality-assured and certified ambient air quality data, additional data showing continued attainment through 2011, the New York-Northern New Jersey-Long Island, NY-NJ-CT, eight-hour ozone moderate nonattainment area has attained the 1997 eight-hour ozone NAAQS. This determination, in accordance with 40 CFR 51.918, suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 annual eight-hour ozone NAAQS.

Subpart HH—New York

■ 5. Section 52.1679 is added to read as follows:

§ 52.1679 Determinations of attainment.

(a) Based upon EPA's review of complete, quality-assured air quality data for the 3-year period 2005 to 2007, EPA determined, as of June 18, 2012, that the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour ozone nonattainment area did not meet its applicable one-hour ozone attainment date of November 15, 2007. Separate from and independent of this determination, based on 2008–2010 complete, quality-assured ozone monitoring data at all monitoring sites in the area, and data for 2011, EPA determined, as of June 18, 2012, that the NY-NJ-CT one-hour ozone nonattainment area met the one-hour ozone NAAQS.

(b) Based upon EPA's review of complete, quality-assured and certified air quality data for the 3-year period 2007 to 2009, and data for 2011, EPA determined, as of June 18, 2012, that the New York-Northern New Jersey-Long Island (NY-NJ-CT) eight-hour ozone moderate nonattainment area attained the 1997 eight-hour ozone NAAQS by the applicable attainment date of June 15, 2010. Therefore, EPA has met the requirement pursuant to CAA section 181(b)(2)(A) to determine, based on the area's air quality data as of the attainment date, whether the area attained the standard. EPA also determined that the NY-NJ-CT nonattainment area will not be reclassified for failure to attain by its applicable attainment date under section 181(b)(2)(A).

■ 6. Section 52.1683 is amended by adding new paragraph (f)(2)(viii) to read as follows:

§ 52.1683 Control strategy: Ozone.

* * * * *

(f) * * *

(2) * * *

(viii) New York-Northern New Jersey-Long Island, NY-NJ-CT, eight-hour ozone moderate nonattainment area (consisting of the Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk and Westchester Counties) as of June 15, 2010 and data showing the area continued to attain through 2011.

* * * * *

[FR Doc. 2012–14716 Filed 6–15–12; 8:45 am]

BILLING CODE 6560–50–P

EVIRONMENTAL PROTECTION AGENCY

40 CFR Part 711

[EPA–HQ–OPPT–2009–0187; FRL–9353–1]

RIN 2070–AJ43

TSCA Inventory Update Reporting Modifications; Chemical Data Reporting; 2012 Submission Period Extension

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending the Toxic Substances Control Act (TSCA) Chemical Data Reporting (CDR) regulations by extending the submission deadline for 2012 reports from June 30, 2012 to August 13, 2012. This is a one-time extension for the 2012 submission period only. The CDR regulations require manufacturers and importers of certain chemical substances included on the TSCA Chemical Substance Inventory (TSCA Inventory) to report current data on the manufacturing, processing, and use of the chemical substances.

DATES: This final rule is effective June 18, 2012.

ADDRESSES: The docket for this action, identified by docket identification (ID) number (No.) EPA–HQ–OPPT–2009–0187, is available either electronically through *http://www.regulations.gov* or in hard copy at the Pollution Prevention and Toxics (OPPT) Docket, Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Chenise Farquharson, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–7768; fax number: (202) 564–4775; email address: *farquharson.chenise@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including manufacture as a byproduct) or import chemical substances listed on the TSCA Inventory. Potentially affected entities may include, but are not limited to:

- Chemical manufacturers and importers (NAICS codes 325 and 324110, e.g., chemical manufacturing and processing and petroleum refineries).
- Chemical users and processors who may manufacture a byproduct chemical substance (NAICS codes 22, 322, 331, and 3344, e.g., utilities, paper manufacturing, primary metal manufacturing, and semiconductor and other electronic component manufacturing).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

II. Background

A. What action is the Agency taking?

In the August 16, 2011, final rule entitled, ''TSCA Inventory Update Reporting Modifications; Chemical Data Reporting'' (76 FR 50816, August 16, 2011) (FRL–8872–9), EPA designated the 2012 CDR submission period to be February 1, 2012 to June 30, 2012. EPA is issuing this amendment to extend the deadline for 2012 CDR submission reports until August 13, 2012.

The Agency is taking this action in response to concerns raised by the regulated community about their ability to submit the required information within the prescribed period. Written requests to extend the CDR submission period are included in the docket (see **ADDRESSES**). The compelling concerns raised by industry include the timing of responses to inquiries about regulatory interpretations, particularly for byproduct chemical substances, and issues associated with several aspects of electronic reporting.