Subpart II—North Carolina

■ 2. Section § 52.1781 is amended by adding paragraph (f) to read as follows:

§ 52.1781 Control strategy: Sulfur oxides and particulate matter.

* * * * *

(f) *Determination of Attaining Data.* EPA has determined, as of January 5, 2010, the Hickory-Morganton-Lenoir, North Carolina, nonattainment area has attaining data for the 1997 $PM_{2.5}$ NAAQS. This determination, in accordance with 40 CFR 52.1004(c), 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 $PM_{2.5}$ NAAQS.

[FR Doc. E9–31084 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2009–0898; FRL–9099–7]

Finding of Failure To Submit Certain State Implementation Plans Required for the 1-Hour Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking a final action finding that the State of California has failed to submit revisions to its State Implementation Plans (SIPs) for three ozone nonattainment areas to satisfy certain requirements of the Clean Air Act (CAA) for the 1-hour ozone National Ambient Air Quality Standards (NAAQS). To accompany this action we are issuing additional guidance to states on developing the required SIP revisions. Under the CAA and EPA's implementing regulations, states with 1-hour ozone nonattainment areas classified as Severe or Extreme were required by the provisions of CAA sections 181(b)(4) and 182(d)(1)(3) to submit by December 31, 2000, SIPs to satisfy CAA section 185. By this action, EPA is making a finding of failure to submit the required SIPs for the State of California for three 1-hour ozone nonattainment areas. With the issuance of additional EPA guidance to states on developing section 185 fee program SIPs, California will be able to complete development and promulgation of these programs. According to the CAA, for each area subject to this finding, EPA must affirmatively find that California has submitted the required plan revision within 18 months of the effective date of this finding, or the offset sanction must apply in that area. Additionally, according to the CAA, if EPA has still not affirmatively determined that a state has submitted the required plan for an area within 6 additional months, the highway funding sanction must apply in that area. Lastly, the CAA requires that no later than 2 years after the effective date of this finding, EPA must promulgate a Federal Implementation Plan (FIP) if the state has not submitted and EPA has not approved the required SIP.

DATES: *Effective Date.* This action is effective on January 5, 2010.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be addressed to: Ms. Denise Gerth, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code: C504–02, 109 TW Alexander Drive, Research Triangle Park, NC 27709, telephone (919) 541–5550, or by E-mail at *gerth.denise@epa.gov;* or Mr. Andrew Steckel, Air Rulemaking Office, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, telephone (415) 947–4115, or by e-mail at *steckel.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
A. Statutory Requirements
B. Consequences of Findings of Failure To Submit a SIP
II. This Action: Areas Receiving a Finding of Failure To Submit SIPs
III. Statutory and Executive Order Reviews
A. Notice and Comment Under the Administrative Procedures Act (APA)
B. Effective Date Under the Administrative Procedures Act
C. Executive Order 12866: Regulatory Planning and Review
D. Paperwork Reduction Act
E. Regulatory Flexibility Act (RFA)
F. Unfunded Mandates Reform Act
G. Executive Order 13132: Federalism
H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
I . Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
J. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
L. National Technology Transfer and Advancement Act
M. Congressional Review Act
N. Judicial Review

I. Background

The CAA requires states with Severe and Extreme ozone nonattainment areas to develop a SIP program that provides for collecting fees from each major stationary source of volatile organic compounds (VOC) and nitrogen oxides (NO_X) for each calendar year following a failure to attain the ozone standard by the applicable attainment date. Section 185 fee program SIPs are required for any area that was designated as not attaining the 1997 8-hour ozone NAAQS in June 2004 and that was also classified as a Severe or Extreme nonattainment area for the 1-hour standard at that time. In a decision by the Circuit Court of Appeals for the District of Columbia, the Court determined that these fee program SIPs were required to prevent backsliding in the transition from implementing the revoked 1-hour NAAQS to implementing the 1997 8-hour NAAQS (*South Coast AQMD* v. *EPA,* December 22, 2006). Although EPA has not determined through notice-and-comment rulemaking that the areas identified in this notice have failed to attain the 1-hour ozone NAAQS by their statutory attainment dates, current air quality data for these areas indicate they are violating the 1-hour NAAQS and the 1997 8-hour NAAQS.[1]

EPA has been working with states and other stakeholders on EPA guidance for developing required fee program SIPs, including the convening of a group of diverse stakeholders through the Clean Air Act Advisory Committee (CAAAC). On May 15, 2009, CAAAC submitted its report to EPA with suggestions and issues for consideration in creating guidance that would provide flexibility to states to develop programs that will meet the requirements of section 185 of the CAA. In conjunction with this action EPA has issued additional guidance that will assist California with development of its section 185 fee SIPs for the affected areas.

A. Statutory Requirements

Section 185 of the CAA requires each Severe and Extreme ozone

[1] Although EPA has not in all cases completed determinations through notice-and-comment rulemaking, current air quality data indicate that a number of nonattainment areas classified as Severe or Extreme for the 1-hour NAAQS and also designated in June 2004 nonattainment for the 1997 8-hour NAAQS appear to have attained the 1-hour NAAQS and/or the 1997 8-hour NAAQS. In this notice EPA is not making findings that states failed to submit SIP revisions for these areas. These areas are: Chicago-Gary-Lake County, IL-IN; Milwaukee-Racine, WI; Philadelphia-Trenton-Wilmington, MD-DE-PA-NJ; Ventura County, CA; Metropolitan Washington, DC-VA-MD; Baton Rouge, LA; New York, NY-NJ-CT; Houston, TX; and Baltimore, MD.

nonattainment area to have a plan implementing the program specified in that section. The fee program applies if an area fails to attain the ozone NAAQS by its applicable attainment date. For each such area, section 185 requires each major stationary source of VOC and NO_X to pay an annual fee for emissions in excess of 80 percent of the emissions baseline.[2] The fee is $5,000 (as adjusted for inflation) per ton of VOC and NO_X emissions that are in excess of the baseline. The CAA states that the computation of a source's ''baseline amount'' must be the lower of the amount of actual or allowable emissions under the permit applicable to the source (or if no permit has been issued for the attainment year, the amount of VOC and NO_X emissions allowed under the applicable implementation plan) during the attainment year. No source is required to pay any fee for emissions during a year for which the area receives an extension of their attainment date under section 181(a)(5).

B. Consequences of Findings of Failure To Submit a SIP

The CAA establishes specific consequences that apply until an area remedies the identified deficiency if EPA finds that a state has failed to submit a SIP or, with regard to a submitted SIP, EPA determines it is incomplete or disapproves it. *See,* CAA section 179(a)(1). Additionally, any of these findings also triggers an obligation for EPA to promulgate a FIP if the state has not submitted and EPA has not approved the required SIP within 2 years of the finding. *See,* CAA section 110(c). The first finding, that a state has failed to submit a plan or one or more elements of a plan required under the CAA, is the finding relevant to this action.

EPA is finding that the State of California has failed to make required section 185 fee program SIP submissions for all or a portion of three 1-hour ozone nonattainment areas. We note that the state has been working to establish its required fee program SIP revisions, and has been awaiting issuance of additional guidance from EPA before proceeding. EPA has now issued additional guidance, and we will continue to work with the state on developing approvable and appropriate fee programs.

If EPA has not affirmatively determined that the state has made the required complete submittal for the three areas within 18 months of the effective date of this rulemaking, pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the offset sanction identified in CAA section 179(b)(2) and 40 CFR 52.31 will apply in each area that remains subject to the finding. If EPA has not affirmatively determined that the state has made a complete submission for the areas within 6 months after the offset sanction is imposed, then the highway funding sanction will apply to each area that remains subject to the finding, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. The 18- and 24-month clocks for any area will stop and the sanctions will not take effect if, within 18 or 24 months, respectively, after the date of the finding, EPA finds that the state has made a complete submittal. In addition, where EPA has made a finding, EPA is required to promulgate a FIP for an area if the state has not made the required SIP submittal and EPA has not taken final action to approve the submittal as fully meeting the section 185 fee obligation for the 1-hour ozone standard within 2 years of EPA's finding.

At approximately the same time as the signing of this action, the EPA Regional Administrator is sending a letter to the State of California informing the state that EPA is determining that the state has failed to submit a SIP addressing the section 185 fee program for the 1-hour ozone NAAQS for all or a portion of the three areas identified below. This letter has been included in docket number EPA–HQ–OAR–2009–0898.

II. This Action: Areas Receiving a Finding of Failure To Submit SIPs

In this action, EPA is making a finding that the State of California has failed to submit section 185 fee program SIPs for all or a portion of three 1-hour ozone nonattainment areas. California submitted a section 185 fee program SIP for the Sacramento Metropolitan Air Quality Management District (AQMD) portion of the Sacramento Metro Area and EPA approved that submission on August 26, 2003, at 68 FR 51184. Therefore, the Sacramento Metropolitan AQMD is not subject to this action. This finding starts the 18-month emission offset sanctions clock, the 24-month highway funding sanctions clock, and a 24-month clock for the promulgation by EPA of a FIP. This action will be effective on January 5, 2010. EPA is making findings of failure to submit section 185 fee program SIPs for the nonattainment areas identified below.

State	Nonattainment area
California	Sacramento Metro Area, CA (severe 15)—Yolo/Solano Air Quality Management District portion; Feather River Air Quality Management District portion; Placer County Air Pollution Control District portion; El Dorado County Air Quality Management District portion.
California	Southeast Desert Modified Air Quality Management Association (severe 17) includes Coachella Valley.
California	Los Angeles-South Coast Air Basin (extreme).

III. Statutory and Executive Order Reviews

A. Notice and Comment Under the Administrative Procedure Act

This is a final EPA action, but is not subject to notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b). EPA believes that because of the limited time provided to make findings of failure to submit regarding SIP submissions, Congress did not intend such findings to be subject to notice-and-comment rulemaking. However, to the extent such findings are subject to notice-and-comment rulemaking, EPA invokes the good cause exception pursuant to the APA, 5 U.S.C. 553(b)(3)(B). Notice and comment are unnecessary because no EPA judgment is involved in making a nonsubstantive finding of failure to submit elements of SIP submissions required by the CAA. Furthermore, providing notice and comment would be impracticable because of the limited time provided under the statute for making such determinations. Finally, notice and comment would be contrary to the

[2] While section 185 expressly mentions VOC, section 182(f) extends the application of this provision to NO_X, by providing that ''plan provisions required under [subpart D)] for major stationary sources of [VOC] shall also apply to major stationary sources of [NO_X].''

public interest because it would divert agency resources from the critical substantive review of complete SIPs. *See* 58 FR 51270, 51272, n.17 (Oct. 1, 1993); 59 FR 39832, 39853 (Aug. 4, 1994).

B. Effective Date Under the Administrative Procedure Act

This action will be effective on January 5, 2010. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if the agency has good cause to specify an earlier effective date. This action concerns SIP submissions that are already overdue. In addition, this action simply starts a ''clock'' that will not result in sanctions against the states for 18 months, and that the state may ''turn off'' through the submission of complete SIP submittals. These reasons support an effective date prior to 30 days after the date of publication.

C. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review by the Office of Management and Budget under the Executive Order.

D. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This rule relates to the requirement in the CAA for states to submit SIPs under section Part D of title I of the CAA to satisfy elements required for the 1-hour ozone NAAQS. The present final rule does not establish any new information collection requirement.

E. Regulatory Flexibility Act (RFA)

This final rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act (APA) or any other statute. Although the rule is subject to the APA, the Agency has invoked the ''good cause'' exemption under 5 U.S.C. 553(b); therefore it is not subject to the notice-and-comment requirement. Thus Executive Order 13132 does not apply to this action.

F. Unfunded Mandates Reform Act

This action contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1998 (UMAR), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new obligations or enforceable duties on any small governments.

G. Executive Order 13132: Federalism

This final rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA establishes the scheme whereby states take the lead in developing plans to meet the NAAQS and the federal government acts as a backstop where states fail to take the required actions. This rule will not modify the relationship of the states and EPA for purposes of developing programs to implement the NAAQS. Thus, Executive Order 13132 does not apply to this rule.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000.) This rule responds to the requirement in the CAA for states to submit SIPs to satisfy the nonattainment area requirements of the CAA for the ozone NAAQS. The CAA requires states with areas that are designated nonattainment for the NAAQS to develop a SIP describing how the state will attain and maintain the NAAQS. There are tribal governments within certain nonattainment areas for which this rule initiates a sanctions clock. However, this rule does not have tribal implications because it does not impose any compliance costs on tribal governments nor does it pre-empt tribal law. The rule 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). Thus, Executive Order 13175 does not apply to this action.

I. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This final rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action does not directly affect the level of protection provided to human health or the environment.

J. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. In this action, EPA is finding that a state has failed to submit SIPs to satisfy the section 185 program fee requirement of the CAA for the 1-hour ozone NAAQS.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment. This notice finds that the state has not met the requirement to submit section 185 fee program SIPs and begins a clock that could result in the imposition of sanctions if the state

continues to not meet this statutory obligation. If the state fails to submit the required SIPs or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the state.

L. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology and Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impracticable. VCS are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations of when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS.

M. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** 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). This rule will be effective January 5, 2010.

N. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date the final action is published in the **Federal Register.** Filing a petition for reconsideration by the EPA 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 must be filed, and shall not postpone the effectiveness of such rule or action.

Thus, any petitions for review of this action making findings of failure to submit section 185 fee program SIPs for the nonattainment areas identified in section II above must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date that the final action is published in the **Federal Register.**

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 20, 2009.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. E9–31173 Filed 1–4–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R9–ES–2009–0086;90100–1660–1FLA]

RIN 1018–AW70

Endangered and Threatened Wildlife and Plants; Final Rule To List the Galapagos Petrel and Heinroth's Shearwater as Threatened Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened status for the Galapagos petrel (*Pterodroma phaeopygia*) previously referred to as (*Pterodroma phaeopygia phaeopygia*); and the Heinroth's shearwater (*Puffinus heinrothi*) under the Endangered Species Act of 1973, as amended (Act). This rule implements the Federal protections provided by the Act for these two foreign seabird species.

DATES: This final rule becomes effective February 4, 2010.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 400, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Nicole Alt, Chief, Division of Conservation and Classification, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703–358–2171; facsimile 703–358–1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires us to make a finding (known as a ''90-day finding'') on whether a petition to add a species to, remove a species from, or reclassify a species on the Federal Lists of Endangered and Threatened Wildlife and Plants has presented substantial information indicating that the requested action may be warranted. To the maximum extent practicable, the finding must be made within 90 days following receipt of the petition and must be published promptly in the **Federal Register**. If we find that the petition has presented substantial information indicating that the requested action may be warranted (a positive finding), section 4(b)(3)(A) of the Act requires us to commence a status review of the species if one has not already been initiated under our internal candidate assessment process.

In addition, section 4(b)(3)(B) of the Act requires us to make a finding within 12 months following receipt of the petition (''12-month finding'') on whether the requested action is warranted, not warranted, or warranted but precluded by higher priority listing. Section 4(b)(3)(C) of the Act requires that a finding of warranted but precluded for petitioned species should be treated as having been resubmitted on the date of the warranted but precluded finding. A warranted-but-precluded finding is, therefore, subject to a new finding within 1 year and subsequently thereafter until we publish a proposal to list or a finding that the petitioned action is not warranted. The Service publishes an annual notice of resubmitted petition findings (annual notice) for all foreign species for which listings were previously found to be warranted but precluded.

Previous Federal Action

On November 28, 1980, we received a petition (1980 petition) from Dr.