protocol agreement between the refiner and the California Air Resources Board with regard to sampling at the off site tankage and consistent with the requirements prescribed in Title 13, California Code of Regulations, section 2250 *et seq.* (May 1, 2003); and

* * * * *

[FR Doc. 04–18380 Filed 8–10–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[CA119–FFA; FRL–7800–4]

Finding of Failure To Attain; Imperial Valley Planning Area; California; Particulate Matter of 10 Microns or Less

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: EPA is today proposing to find under the Clean Air Act (CAA) that the Imperial Valley Planning Area (Imperial Valley) failed to attain the National Ambient Air Quality Standards (NAAQS) for particulate matter of 10 microns or less (PM–10) by the serious area statutory deadline of December 31, 2001.

Separately in today's **Federal Register**, EPA is publishing its final action in response to a recent Ninth Circuit Court order compelling EPA to reclassify the Imperial Valley PM–10 nonattainment area from moderate to serious because the area failed to meet the moderate area attainment date of December 31, 1994.

The proposed finding of failure to attain the serious area attainment date of December 31, 2001, is based on monitored air quality data for the PM–10 NAAQS from January 1999 through December 2001. If EPA takes final action finding that Imperial Valley failed to attain, the State of California must submit within one year of publication of the final action, a plan that provides for attainment of the PM–10 NAAQS and that achieves at least 5 percent annual reductions in PM–10 or PM–10 precursor emissions as required by CAA section 189(d).

DATES: Comments on this proposed action must be received by September 10, 2004.

ADDRESSES: Send comments to David Wampler, Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901 or e-mail to *wampler.david@epa.gov,* or submit comments at *http://www.regulations.gov.*

You can inspect and copy the docket for this action at our Region IX office during normal business hours (*see* address below). Due to increased security, we suggest that you call at least 24 hours prior to visiting the Regional Office so that we can make arrangements to have someone meet you. The **Federal Register** notice is also available as an electronic file on EPA's Region 9 Web page at *http://www.epa.gov/region09/air.*

Planning Office (AIR–2), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

FOR FURTHER INFORMATION CONTACT: David Wampler, U.S. Environmental Protection Agency, Region 9, Air Division, Planning Office (AIR–2), 75 Hawthorne Street, San Francisco, CA 94105; (415) 972–3975; *wampler.david@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the words ''we,'' ''us,'' or ''our'' mean U.S. EPA.

I. Background

Imperial County is located in the southeastern corner of California. It has borders with Mexico to the south, Arizona to the east, and San Diego County to the west. Most of Imperial County falls within the Imperial Valley Planning Area (Imperial Valley). 40 CFR part 81. The local jurisdiction that is responsible for air pollution control is the Imperial County Air Pollution Control District (ICAPCD).

Upon enactment of the Clean Air Act Amendments of 1990, Imperial Valley was classified as a moderate PM–10 nonattainment area. The CAA requires that moderate areas attain the PM–10 NAAQS by December 31, 1994. CAA section 188(c)(1). Moderate areas failing to attain the NAAQS by the prescribed attainment date must be reclassified as serious under CAA section 188(b)(2). However, CAA section 179(B)(d) provides that any area that establishes to the satisfaction of EPA that it would have attained the PM–10 NAAQS by the applicable attainment date but for emissions emanating from outside the United States, is not subject to the provisions of CAA section 182(b)(2), *i.e.,* reclassification to serious nonattainment.

In July 2001, ICAPCD and the California Air Resources Board (CARB) submitted evidence that the Imperial Valley would have attained the PM–10 NAAQS by the 1994 attainment date, but for transport from Mexico. On October 19, 2001, EPA made a final finding that Imperial Valley would have attained the PM–10 NAAQS by December 1994 but for PM–10 emissions emanating from Mexico. 66 FR 53106.

The Sierra Club petitioned for review of our October 2001 final action in the U.S. Court of Appeals for the Ninth Circuit. On October 9, 2003, the Court issued its opinion. *Sierra Club* v. *United States Environmental Protection Agency,* et al., 352 F.3d 1186. The Court rejected EPA's factual determination with respect to two days, January 19 and 25, 1993, on which PM–10 exceedances of the 24-Hour PM–10 NAAQS occurred, finding that ''[b]ased on the data and the reports in the record, there simply is no possibility that Mexican transport could have caused the observed PM–10 exceedances * * *.'' The effect of this conclusion is that Imperial Valley had exceedances of the PM–10 NAAQS that preclude a finding that the area would have attained the NAAQS by 1994. The Court, concluding that further administrative proceedings with respect to the 1994 exceedances would serve no useful purpose, instructed EPA to reclassify Imperial Valley as a serious PM–10 nonattainment area.

On December 18, 2003, the Ninth Circuit denied a petition for rehearing by ICAPCD, an intervener in the case, slightly revised its October 9, 2003, opinion, and granted ICAPCD's motion to stay the mandate until March 17, 2004, to permit ICAPCD to file a petition for a writ of certiorari in the U.S. Supreme Court. Imperial County did so on March 17, 2004. On June 21, 2004, the Supreme Court declined to hear the case. *Imperial County Air Pollution Control District* v. *Sierra Club,* et al., 72 U.S.L.W. 3757. Thereafter the stay was lifted and the mandate issued.

Accordingly, elsewhere in today's **Federal Register**, EPA is publishing its final action in response to the Ninth Circuit's October 9, 2003, opinion, finding that Imperial Valley failed to attain the PM–10 NAAQS by the moderate area statutory deadline of December 31, 1994, and reclassifying the area from moderate to serious. All serious PM–10 nonattainment areas were required to attain the standards by no later than December 31, 2001, unless granted a one-time extension of up to five years. CAA section 188(c)(2) and (e).

II. Proposed Finding of Failure To Attain by December 31, 2001

A. Clean Air Act Requirements

EPA has the responsibility, pursuant to CAA sections 179(c) and 188(b)(2), of determining within 6 months of the applicable attainment date (*i.e.,* by June 30, 2002) whether Imperial Valley attained the annual and 24-hour NAAQS. Because June 30, 2002, has passed, EPA must 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 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 Air Quality System Database (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.

Pursuant to appendix K, attainment of the annual PM–10 NAAQS is achieved when the expected annual arithmetic mean PM–10 concentration at each monitoring site in the area is less than or equal to the level of the standard (50 $\mu g/m^3$). Attainment of the 24-hour PM–10 NAAQS is achieved when the expected number of exceedances of the 24-hour NAAQS (150 $\mu g/m^3$) 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 annual and 24-hour standards 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.

B. Ambient Air Monitoring Data

The ambient air quality network in Imperial Valley consists of PM–10 monitoring stations throughout the Valley. For a map with locations of the current monitors please see: *http://www.arb.ca.gov/aqd/namslams/ss.pdf.* In general, PM–10 data from these monitoring stations are collected on a regular basis and reported to our AQS Database.

1. Annual PM–10 Standard

According to data in the AQS database, three monitoring sites in the Imperial Valley were in violation of the annual PM–10 NAAQS for the time period leading up to the serious area attainment date—January 1, 1999, through December 31, 2001. Data for these monitors during the three-year period are listed in Table 1 below. 40 CFR part 50 states that the annual PM–10 standard is met when the annual arithmetic mean concentration is less than or equal to 50 micrograms per cubic meter ($\mu g/m^3$). The expected annual arithmetic mean is determined by averaging the annual arithmetic mean PM–10 concentration for the three years preceding the attainment date (in this case 1999 through 2001). The procedure for calculating arithmetic mean is discussed in 40 CFR part 50 appendix K, section 4.0.

TABLE 1.—IMPERIAL VALLEY MONITORING SITES THAT VIOLATE THE ANNUAL PM–10 NAAQS (1999–2001)

Site name	3-year annual average ($\mu g/m^3$)
Calexico, Ethel Street	81
Calexico, Grant Street	85
Westmorland	52

2. 24-Hour PM–10 Standard

In addition to violations of the annual PM–10 NAAQS, data from six monitors located in Imperial Valley show violations of the 24-hour PM–10 NAAQS. According to 40 CFR part 50, the 24-hour PM–10 NAAQS is attained when the expected number of days per calendar year with a 24-hour average above 150 $\mu g/m^3$ is equal to or less than one. In the simplest case, the number of expected exceedances at a site is determined by recording the number exceedances in each calendar year and then averaging them over the past three calendar years. This means that if a monitoring site has four or more observed or estimated exceedances in a three-year period then it is in violation of the 24-hour PM–10 NAAQS. Generally, if PM–10 sampling is scheduled less than every day, EPA requires the adjustment of observed exceedances to account for days for which a sample was not collected. The method for adjusting the observed exceedances to determine the estimated exceedances for a year is described in 40 CFR part 50, appendix K, section 3.1.

The six monitoring sites in Imperial Valley that were in violation of the 24-hour PM–10 NAAQS during the calendar years 1999 through 2001 are listed below in Table 2 along with the number of estimated 24-hour exceedances at each site for each year and the average number of expected exceedance days per year during the three-year period. All of the sites listed in Table 2 operate on a one-in-six day schedule. For each of these sites, the average number of expected exceedance days per year over the three-year period 1999–2001 exceeds one.

TABLE 2.—24-HOUR PM–10 ESTIMATED EXCEEDANCES IN THE IMPERIAL VALLEY NONATTAINMENT AREA (1999 THROUGH 2001)

Monitoring station	Estimated exceedance days 1999	Estimated exceedance days 2000	Estimated exceedance days 2001	Average number of expected exceedance days per year 1999–2001
Calexico, Grant Street	31.7	37.9	12	27.2
Calexico, Ethel St.	12.9	30	18	20.3
Niland	0	12.9	6.4	6.4
Brawley	0	6.9	0	2.3
Westmorland	0	12.8	6	6.3
El Centro	0	6	6.4	4.1

III. Proposed Action

EPA is proposing to find that Imperial Valley did not attain the annual or 24-hour PM–10 NAAQS by the December 31, 2001 attainment date as discussed in section II above.

Pursuant to CAA section 189(d), serious PM–10 nonattainment areas that fail to attain are required to submit ''plan revisions which provide for attainment of the PM–10 air quality standards [1] 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.'' Among other things, the plan revision must also provide for the expeditious implementation of best available control measures (BACM) pursuant to CAA section 189(b)(1)(B). Under section 189(d) the applicable submittal deadline for the plan revision is within 12 months of the applicable attainment date. Since that date, December 31, 2002, has passed, the plan revision is due within one year of publication of a final finding of nonattainment pursuant to CAA section 179(d).

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed 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 proposed 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 proposed action in and of itself establishes no new requirements, it merely notes that the air quality in Imperial Valley did not meet the Federal health standards for PM–10 by the CAA deadline. Accordingly, the Administrator certifies that this proposed 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 proposed rule does not in and of itself establish new requirements, EPA believes that it is questionable whether a requirement to submit a SIP revision constitutes a Federal mandate. The obligation for a State to revise its SIP arises out of sections 110(a), 179(d), and 189(d) of the CAA and is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of section 421(5)(9a)(I) of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 658(a)(I)). Even if it did, the duty could be viewed as falling within the exception for the condition of Federal assistance under section 421(5)(a)(i)(I) of UMRA (2 U.S.C. 658(5)(a)(i)(I)). Therefore, today's proposed action 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 proposed 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 proposed action does not in and of itself create any new requirements and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed 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. Because this proposed finding of failure to attain is a factual determination based on air quality considerations, 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 proposed 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.*).

List of Subjects in 40 CFR Part 81

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

Authority: 42 U.S.C. 7401–7671q.

Dated: August 3, 2004.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 04–18379 Filed 8–10–04; 8:45 am]

BILLING CODE 6560–50–P

[1] Under section 179B(a), the attainment demonstration in any future PM–10 plan submitted by the State for Imperial Valley may be based on a showing of attainment but for emissions emanating from Mexico. EPA's prior action under section 179(B)(d) and the Ninth Circuit's recent decision were based on evaluation of 1992–1994 data and do not preclude the State from pursuing a future 179B(a) demonstration, if applicable.