Michigan or his on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Lake Michigan or his on-scene representative.

Dated: July 29, 2008.

Peter V. Neffenger,

Rear Admiral, U.S. Coast Guard Commander, Ninth Coast Guard District.

[FR Doc. E8–18078 Filed 8–6–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1030; FRL–8573–5]

Approval and Promulgation of Air Quality Implementation Plans; Colorado; Affirmative Defense Provisions for Malfunctions; Common Provisions Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving a State Implementation Plan (SIP) revision submitted by the State of Colorado on August 1, 2007. This revision establishes affirmative defense provisions for source owners and operators for excess emissions during periods of malfunction. The affirmative defense provisions are contained in the State of Colorado's Common Provisions regulation. The intended effect of this action is to approve only those portions of Colorado's Common Provisions regulation submitted on August 1, 2007 that relate to the affirmative defense for malfunctions. This action is being taken under section 110 of the Clean Air Act.

DATES: This rule is effective on October 6, 2008, without further notice, unless EPA receives adverse comment by September 8, 2008. If adverse comment is received, EPA will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1030, by one of the following methods:

- *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *komp.mark@epa.gov*.
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–A, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–1030. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. 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, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Komp, Air Program, 1595 Wynkoop Street, Mailcode: 8P–A, Denver, Colorado 80202–1129, (303) 312–6022, *komp.mark@epa.gov*.

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Colorado* mean the State of Colorado unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked

will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Background of State Submittal

On August 1 2007, the State of Colorado submitted a formal revision to its State Implementation Plan (SIP) that added affirmative defense provisions for excess emissions during periods of malfunctions and removed existing provisions regarding upsets. These affirmative defense provisions are contained in the Common Provisions Regulation at sections I.G. and II.E. The Colorado Air Quality Control Commission (AQCC) adopted these revisions on December 15, 2006.

Previously, EPA, in a letter dated June 13, 2001 from Richard L. Long, Director, EPA Region 8 Air and Radiation Program, to Margie Perkins, Director, Colorado's Air Pollution Control Division, identified concerns with Colorado's existing upset rule in the State's Common Provisions Regulation. We believed that Colorado's existing upset rule did not conform to the Clean Air Act requirements to protect National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) increments and should be revised. Specifically, the existing upset rule allowed an exemption from enforcement for excess emissions that occurred during certain defined ''upset conditions.'' EPA's interpretation was and continues to be that the Clean Air Act requires that all periods of excess emissions be treated as violations and not exempted from enforcement.

During 2002, the AQCC considered EPA's position but ultimately rejected EPA's request for revision and suggested language to the Common Provisions Regulation to address our findings. On December 22, 2005 we received a petition to issue a SIP call to require Colorado to revise aspects of its Common Provisions regulation related to upset conditions. The petitioners were Rocky Mountain Clean Air Action, Center for Native Ecosystems, and Jeremy Nichols. The petition alleged that Colorado's exemption for excess emissions during upsets was inconsistent with the Clean Air Act. The petition referred to our previous statement that Colorado's upset rule did not conform to the Clean Air Act.

The State indicated a willingness to renew efforts to revise the upset provisions in the Common Provisions regulation, and related provisions in other regulations. The State's December 15, 2006 Statement of Basis, Specific Statutory Authority and Purpose for Revisions to the Common Provisions (that was later submitted on August 1, 2007) indicates that revisions were made regarding upset conditions and malfunctions to ''clarify the process by which a source must identify an upset or malfunction.'' The State changed the term ''upset'' to ''malfunction'' for consistency with EPA policy. In addition, provisions within the Common Provisions were revised to clarify that an affirmative defense is available to claims of violation of the AQCC's regulations for civil penalties in enforcement actions regarding excess emissions arising from malfunctions.

III. EPA Analysis of State Submittal

EPA's interpretations of the Act regarding excess emissions during malfunctions are contained in, among other documents, a September 20, 1999 memorandum titled ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation.[1] That memorandum indicates that because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the NAAQS or jeopardize the PSD increments, all periods of excess emissions are considered violations of the applicable emission limitation. However, the memorandum recognizes that in certain circumstances states and EPA have enforcement discretion to refrain from taking enforcement action for excess emissions. In addition, the memorandum also indicates that states can include provisions in their SIPs that would, in the context of an enforcement action for excess emissions, excuse a source from penalties (but not injunctive relief) if the source can demonstrate that it meets certain criteria (an ''affirmative defense'').[2] Finally, the memorandum indicates that EPA does not intend to approve SIP revisions that would recognize a state director's decision to bar EPA's or citizens' ability to enforce applicable requirements.

We have evaluated Colorado's affirmative defense provisions for malfunctions and find that they are consistent with our interpretations under the Act regarding the types of affirmative defense provisions we can approve in SIPs. The Affirmative Defense provisions in the Common Provisions Regulation, sections I.G and II.E, are consistent with the provisions for malfunctions we suggested in our September 20, 1999 memorandum. More specifically, section II.E of the Common Provisions Regulation provides owners and operators with an affirmative defense, to civil penalties only, for excess emissions during periods of malfunction. To establish the affirmative defense in an enforcement action and to be relieved of a civil penalty, the owner or operator of the facility must meet the notification requirements in section II.E.2 of the Common Provisions Regulation and prove by a preponderance of evidence the following:

1. The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;

[1] Earlier expressions of EPA's interpretations regarding excess emissions during malfunctions, startup, and shutdown are contained in two memoranda, one dated September 28, 1992, the other February 15, 1983, both titled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions'' and signed by Kathleen M. Bennett. However, the September 1999 memorandum directly addresses the creation of affirmative defenses in SIPs and, therefore, is most relevant to this action.

[2] EPA's September 20, 1999 memorandum indicates that the term affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. See footnote 4 of the attachment to the memorandum.

2. The excess emissions did not stem from any activity or event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;

3. Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded.

4. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

5. All reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

6. All emissions monitoring systems were kept in operation (if at all possible);

7. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;

8. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

9. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

10. During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards that could be attributed to the emitting source.

Per section II.E.3 of the Common Provisions Regulation, the affirmative defense is not available to claims for injunctive relief. Also, per section II.E.4 of the Common Provisions Regulation, the affirmative defense provision does not apply to failures to meet federally promulgated performance standards or emission limits, such as New Source Performance Standards or National Emission Standards for Hazardous Air Pollutants. It also does not apply to SIP limits or permit limits that have been set taking into account potential emissions during malfunctions, such as certain limits with 30-day or longer averaging times, limits that indicate that they apply during malfunctions, or limits that indicate that they apply at all times without exception.

Section II.E.2 of the Common Provisions Regulation provides that an owner or operator of a facility experiencing excess emissions during a malfunction must notify the Colorado Air Pollution Control Division verbally as soon as possible, but no later than noon of the Division's next working day, and in writing by the end of the source's next reporting period. The written notification must address the elements of the affirmative defense.

Section I.G of the Common Provisions Regulation defines ''malfunction'' as any sudden and unavoidable failure of air pollution control equipment or process equipment or unintended failure of a process to operate in a normal or usual manner and indicates that failures that are primarily caused by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions.

We interpret the affirmative defense as applying in an enforcement proceeding, and the merits of the defense in a particular case would be determined by an independent judicial or administrative tribunal. Accordingly, the State's decision in a particular case that an enforcement action was not warranted, or that an owner or operator had proved the elements of the affirmative defense, would not bar an EPA or citizen enforcement action and would not bind a judicial or administrative tribunal. The rule that we are approving preserves the right of the State, EPA, and citizens to independently exercise enforcement discretion.

The provisions of sections I.G and II.E will provide sources with appropriate incentives to comply with their emissions limitations and help ensure protection of the NAAQS and increments and compliance with other Act requirements.[3]

IV. Consideration of Section 110(l) of the CAA

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress toward attainment of the NAAQS or any other applicable requirement of the Act. The Colorado SIP revision that is the subject of this document does not interfere with attainment of the NAAQS or any other applicable requirement of the Act. The August 1, 2007 submittal removes a provision from the Colorado SIP that provided an outright exemption from emission limits during upsets and replaces it with a provision that establishes an affirmative defense, to civil penalties only, for excess emissions during malfunctions. The affirmative defense does not apply to claims for injunctive relief, and the elements of the affirmative defense are rigorous and well-defined. The need to meet these elements will provide sources with significant incentives to minimize their emissions, comply with their emission limits, and protect the NAAQS and increments. Therefore, section 110(l) requirements are satisfied.

V. Final Action

For the reasons expressed above, we are approving sections I.G and II.E of the Common Provisions Regulation submitted on August 1, 2007. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective October 6, 2008 without further notice unless the Agency receives adverse comments by September 8, 2008. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable

[3] It is our understanding that the State intended to include with this submittal a minor revision to AQCC Regulation No. 1, section IV.G.5, to conform its provisions to the affirmative defense provisions in the Common Provisions Regulation. That provision reads, ''Compliance with the reporting requirements of this Section IV.G. shall not relieve the owner or operator of the reporting requirements of Section II.E of the Common Provisions Regulation concerning upset conditions and breakdowns.'' The State intended to change the words ''upset conditions and breakdowns'' to ''malfunctions.'' We have been told that this revision was inadvertently overlooked, but that it will be made this year. This omission does not affect the approvability of sections I.G and II.E of the Common Provisions Regulation. And, even though we have not received and approved the correction to section IV.G.5 of Regulation No. 1, we nonetheless believe it is reasonable to interpret section IV.G.5 of Regulation No.1 as cross-referencing the reporting requirements for malfunctions under section II.E of the Common Provisions Regulation, which we are approving today.

Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is 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.*);

• 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);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is 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

• Does 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 October 6, 2008. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 12, 2008.

Carol Rushin,

Acting Regional Administrator, Region 8.

■ 40 CFR part 52 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 G—Colorado

■ 2. Section 52.320 is amended by adding paragraph (c)(113) to read as follows:

§ 52.320 Identification of plan.

(c) * * *

(113) On August 1, 2007, the State of Colorado submitted revisions to Colorado's Common Provisions Regulation, 5 CCR 1001–2, that made changes and additions to Section I, ''Definitions, Statement of Intent, and General Provisions Applicable to All Emission Control Regulations Adopted by the Colorado Air Quality Control Commission,'' and Section II, ''General.''

(i) Incorporation by reference.

(A) Common Provisions Regulation, 5 CCR 1001–2, Section I.G, ''Definitions,'' effective on March 4, 2007.

(*1*) The submittal revises Section I.G by removing the definition of ''upset conditions'' and replacing it with the definition of ''malfunction.''

(B) Common Provisions Regulation, 5 CCR 1001–2, Section II.E, ''Affirmative Defense Provision for Excess Emissions During Malfunctions,'' effective on March 4, 2007.

(*2*) The submittal revises Section II.E by removing language which provided an exemption for excess emissions during upset conditions and breakdowns and replacing it with an affirmative defense provision for source owners and operators for excess emissions during malfunctions.

[FR Doc. E8–16268 Filed 8–6–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071030625–7696–02]

RIN 0648–XJ37

Fisheries of the Northeastern United States; Summer Flounder Fishery; Commercial Quota Harvested for the Commonwealth of Massachusetts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the 2008 summer flounder commercial quota allocated to the Commonwealth of Massachusetts has been harvested. Vessels issued a commercial Federal fisheries permit for the summer flounder fishery may not land summer flounder in Massachusetts for the remainder of calendar year 2008, unless additional quota becomes available through a transfer from another state. Regulations governing the summer flounder fishery require publication of this notification to advise Massachusetts that the quota has been harvested and to advise vessel permit holders and dealer permit holders that no commercial quota is available for landing summer flounder in Massachusetts.