



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2011-0927; FRL-9906-67-Region3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Prevention of Significant Deterioration and Nonattainment New Source Review; Fine Particulate Matter (PM_{2.5})

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving revisions to the Virginia State Implementation Plan (SIP), submitted by the Virginia Department of Environmental Quality (VADEQ) on August 25, 2011. The revisions pertaining to Virginia's Prevention of Significant Deterioration (PSD) program are being fully approved. EPA is granting limited approval to the revisions pertaining to Virginia's nonattainment New Source Review (NSR) program. In both cases, the revisions incorporate preconstruction permitting regulations for fine particulate matter (PM_{2.5}) into the Virginia SIP. In addition, EPA is approving these revisions and portions of other related submissions for the purpose of determining that Virginia has met its statutory obligations with respect to the infrastructure requirements of the Clean Air Act (CAA) which relate to Virginia's PSD permitting program and are necessary to implement, maintain, and enforce the 1997 8-hour ozone and PM_{2.5} National Ambient Air Quality Standards (NAAQS), the 2006 PM_{2.5} NAAQS, and the 2008 lead NAAQS. EPA is approving these revisions in accordance with the requirements of the CAA. A previous PSD program approval of Virginia's Chapter 80, Article 8 regulations was provided to the Commonwealth as a "limited approval" for reasons that do not impact the approval of the August 25, 2011 submission. A correction related to that prior limited approved is also included in this action.

DATES: This final rule is effective on [insert date 30 days from date of publication].

ADDRESSES: EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2011-0927**. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (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 for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

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SUPPLEMENTARY INFORMATION:

I. Background

On August 1, 2012 (77 FR 45523), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. In the NPR, EPA proposed approval of amendments to Virginia's major NSR permitting regulations under the Virginia Administrative Code (VAC) to incorporate requirements for PM_{2.5}. Additionally, EPA proposed to approve these revisions and portions of other related submissions for the purpose of determining that Virginia has met its statutory obligations with respect to the infrastructure requirements of CAA section 110(a) which

relate to Virginia's PSD permitting program and are necessary to implement, maintain, and enforce the 1997 8-hour ozone and PM_{2.5} NAAQS, the 2006 PM_{2.5} NAAQS, and the 2008 lead NAAQS. The formal SIP revision request was submitted by Virginia on August 25, 2011.

II. Summary of SIP Revision

Virginia's August 25, 2011 SIP submittal included revisions to the general definitions under Chapter 10 of 9VAC5 (specifically 9VAC5-10-30), as well as revisions to Articles 8 (PSD) and 9 (nonattainment NSR) under Chapter 80 of 9VAC5. The following regulations under Article 8 are revised: 9VAC5-80-1615 (Definitions); 9VAC5-80-1635 (Ambient Air Increments); 9VAC5-80-1695 (Exemptions); 9VAC5-80-1715 (Source Impact Analysis); and 9VAC5-80-1765 (Sources Affecting Federal Class I Areas – Additional Requirements). Under Article 9, the regulations at 9VAC5-80-2010 (Definitions) and 9VAC5-80-2120 (Offsets) are amended.

As discussed in the NPR, in light of litigation EPA proposed to take no action with regard to the Significant Impact Level (SIL) regulation at paragraph A(2) of 9VAC5-80-1715 (*See*, 77 FR 45523). On January 22, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Sierra Club v. EPA* (705 F.3d 458, 469), issued a judgment that, *inter alia*, vacated and remanded the provisions at 40 CFR section 51.166(k)(2), which were promulgated as part of the October 20, 2010 "Prevention of Significant Deterioration for Particulate Matter Less than 2.5 Micrometers (PM_{2.5}) –Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentrations (SMC)," (2010 PSD PM_{2.5} Rule)¹. These provisions were the Federal counterparts to Virginia's PM_{2.5} SIL regulations at paragraph A(2) of 9VAC5-80-1715. Additionally, the court vacated the provisions at section 51.166(i)(5)(i)(c), which were the

¹ See 75 FR 64864 (October 12, 2010).

Federal counterparts to Virginia's PM_{2.5} SMC regulations at paragraph E(1) of 9VAC5-80-1695 (*See, Sierra Club v. EPA*, 705 F.3d at 469). EPA proposed approval of Virginia's PM_{2.5} SMC provisions in our NPR. In light of the court's decision, by letter dated February 13, 2013, Virginia officially withdrew from the August 25, 2011 submittal the PM_{2.5} SIL regulation at paragraph A(2) of 9VAC5-80-1715, and the portion of paragraph E(1) of 9VAC5-80-1695 pertaining to the PM_{2.5} SMC. Accordingly, EPA is not finalizing approval of these provisions. Therefore, EPA's approval with respect to sections 5-80-1695 and 5-80-1715 is limited to the remaining revisions which were not impacted by the court decision.

Subsequent to publication of the NPR, on January 4, 2013, the D.C. Circuit, in *Natural Resources Defense Council v. EPA*², issued a decision that remanded the EPA's 2007 and 2008 rules implementing the 1997 PM_{2.5} NAAQS. The court's remand of EPA's 2008 implementation rule, "Implementation of New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM_{2.5})" (referred to herein as "the 2008 NSR PM_{2.5} Rule")³, is relevant to this final rulemaking. This rule promulgated NSR requirements for implementation of PM_{2.5} in both nonattainment areas (nonattainment NSR) and attainment/unclassifiable areas (PSD). The court found that EPA erred in implementing the PM_{2.5} NAAQS pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than pursuant to the additional implementation provisions specific to particulate matter nonattainment areas in subpart 4. The court ordered the EPA to "repromulgate these rules pursuant to Subpart 4 consistent with this opinion," (*Id.* at 437). Although the court declined to establish a deadline for EPA's response to the remand, EPA intends to promulgate new generally applicable implementation regulations for the PM_{2.5} NAAQS in accordance with the requirements of subpart 4. In the interim, however,

² See 706 F.3d 428 (D.C. Cir. 2013).

³ See 73 FR 28321 (May 16, 2008).

states and EPA still need to proceed with implementation of the PM_{2.5} NAAQS in a timely and effective fashion in order to meet statutory obligations under the CAA and to assure the protection of public health intended by those NAAQS.

As discussed in the NPR, VADEQ's August 25, 2011 SIP submittal included revisions to Virginia's nonattainment NSR program consistent with the provisions promulgated in the 2008 NSR PM_{2.5} Rule. Specifically, under Article 9, the state submitted amendments to the regulations at 9VAC5-80-2010 (Definitions) and 9VAC5-80-2120 (Offsets) for approval into the SIP, including the PM_{2.5} significant emission rates (SERs), regulation of certain PM_{2.5} precursors (SO₂ and NO_x), the regulation of PM₁₀ and PM_{2.5} condensable emissions, and the emissions offset requirements. In light of the D.C. Circuit's remand of the 2008 NSR PM_{2.5} Rule and for the reasons explained below, EPA is not prepared at this time to grant full approval to VADEQ's August 25, 2011 submittal as to these elements.

EPA is in the process of evaluating the requirements of subpart 4 as they pertain to nonattainment NSR. In particular, subpart 4 includes section 189(e) of the CAA, which requires the control of major stationary sources of PM₁₀ precursors (and hence under the court decision, PM_{2.5} precursors) "except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the standard in the area." The evaluation of which precursors need to be controlled to achieve the standard in a particular area is typically conducted in the context of the state's preparing and the EPA's reviewing of an area's attainment plan SIP. In this case, there is only one designated PM_{2.5} nonattainment area in the State, the Virginia portion of the Washington, DC-MD-VA nonattainment area for the 1997 annual PM_{2.5} NAAQS. Virginia submitted an attainment plan for this area on April 4, 2008.

On January 12, 2009, EPA finalized a clean data determination for the area, (74 FR 1146), which suspended the requirement for the state to submit, among other things, an attainment plan SIP for the area. Accordingly, on January 23, 2012, Virginia withdrew the attainment plan SIP, and it is no longer before EPA. As EPA does not have before it the state's analysis as to which precursors need to be controlled in the area as contained in the attainment plan SIP, it cannot fully approve as complying with the CAA a nonattainment NSR SIP that only addresses a subset of the scientific PM_{2.5} precursors recognized by EPA.

On the other hand, while VADEQ's submittal may not yet contain all of the elements necessary to satisfy the CAA requirements when evaluated under subpart 4, the revisions represent a considerable strengthening of Virginia's currently approved nonattainment NSR SIP which does not address PM_{2.5} at all. Therefore, EPA is granting limited approval to the nonattainment NSR provisions in VADEQ's August 25, 2011 submittal.

For the reasons explained above, EPA is not evaluating at this time whether Virginia's submittal will require additional revisions to satisfy the subpart 4 requirements. Once EPA re-promulgates the Federal PM_{2.5} regulations with respect to nonattainment NSR permitting in response to the court's remand, EPA will consider whether a limited disapproval should also be finalized.

Moreover, Virginia has submitted a request to redesignate the nonattainment area, which, if granted, would absolve the State of any further obligation to comply with the subpart 4 requirements for nonattainment NSR as to this area. Alternatively, VADEQ can obtain full approval by, if necessary, revising its regulations accordingly to address EPA's revised regulations and submitting them to EPA as a formal SIP revision.

As previously discussed, VADEQ's August 25, 2011 SIP submittal also includes revisions to Virginia's PSD program consistent with the provisions promulgated in the 2008 NSR PM_{2.5} Rule. Specifically, under Article 8, the following regulations are revised (with the previously noted exceptions): 9VAC5-80-1615 (Definitions); 9VAC5-80-1635 (Ambient Air Increments); 9VAC5-80-1695 (Exemptions); 9VAC5-80-1715 (Source Impact Analysis); and, 9VAC5-80-1765 (Sources Affecting Federal Class I Areas – Additional Requirements). As the requirements of subpart 4 only pertain to nonattainment areas, it is EPA's position that the portions of the 2008 NSR PM_{2.5} Rule that address requirements for PM_{2.5} attainment and unclassifiable areas are not affected by the D.C. Circuit's opinion in *NRDC v. EPA*. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated in the 2008 NSR PM_{2.5} Rule in order to comply with the court's decision. Accordingly, EPA's approval of Virginia's SIP as to the PSD requirements promulgated by the 2008 NSR PM_{2.5} Rule does not conflict with the court's opinion.

Similarly, in the NPR, EPA also proposed to approve portions of related infrastructure (or CAA Section 110(a)(2)) SIP submissions, for the purpose of determining that Virginia has met its statutory obligations with respect to the PSD-related infrastructure requirements of CAA section 110(a) for the 1997 8-hour ozone and PM_{2.5} NAAQS, the 2006 PM_{2.5} NAAQS, and the 2008 lead NAAQS. Virginia submitted the related infrastructure SIP revisions on the following dates: November 13, 2007, December 13, 2007, July 10, 2008, September 2, 2008, April 1, 2011, and March 9, 2012. For the reasons explained above, it is also EPA's position that EPA's approval of the portions of the above identified Virginia's infrastructure SIPs which relate to compliance with the PSD requirements set forth in Sections 110(a)(2)(C), (D)(i)(II), and (J) does not conflict

with the court's remand of the 2008 NSR PM_{2.5} Rule.⁴

In addition to the proposed approval of the PSD portions of section 110(a)(2)(D)(i)(II), EPA stated in the NPR that: "Because Virginia has met its obligations with respect to the visibility requirements of section 110(a)(2)(D)(i)(II) by virtue of its regional haze SIP, which EPA took final action to approve on March 23, 2012 (77 FR 16397), EPA is also proposing to approve the portions of Virginia's previous infrastructure submittals related to the visibility requirements of section 110(a)(2)(D)(i)(II) for the 1997 ozone, 1997 PM_{2.5}, 2006 PM_{2.5}, and 2008 lead NAAQS."

As discussed in Section III, below, EPA has already taken separate and final action to approve the portions of these identified SIP submittals which relate to the section 110(a)(2)(D)(i)(II) visibility requirements for the 1997 ozone, 1997 PM_{2.5}, 2006 PM_{2.5}, and 2008 lead NAAQS. Therefore, EPA is taking no action on the proposed approval of the visibility requirements for these identified SIP submittals.⁵ EPA is only taking final action to approve the portions of the above identified infrastructure SIPs which relate to Virginia's PSD program.

Other specific requirements of Virginia's August 25, 2011 SIP submittal and the rationale for EPA's proposed action are explained in the NPR and will not be restated here.

III. EPA's Response to Comments Received on the Proposed Action

EPA received two sets of comments on the August 1, 2012 NPR. A full set of these comments is

⁴ The court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 NSR PM_{2.5} Rule also does not affect the EPA's proposed approval of the present infrastructure action. The EPA interprets the Act to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due 3 years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

⁵ EPA also notes there was an inadvertent, incorrect citation to the Virginia regional haze SIP approval in the NPR. The correct citation to EPA's approval of the Virginia regional haze SIP is 77 FR 35287 (June 13, 2012) (effective July 13, 2012).

provided in the docket for today's final action. A summary of the comments and EPA's responses are provided herein.

Comment: The first commenter asserted simply that the Federal government should not be involved in state affairs.

EPA Response: As Congress has recognized, the regulation of air pollution in Virginia is not a "state affair" for which Virginia bears sole responsibility. The CAA establishes a partnership between state and Federal entities for the protection and improvement of the nation's air quality. Under CAA section 109, EPA is required to establish National Ambient Air Quality Standards (NAAQS) for the protection of public health and welfare. Subsequent to the promulgation (or revision) of a NAAQS, states are required by CAA section 110 to adopt and submit to EPA for approval, a SIP which provides for the implementation, maintenance, and enforcement of the NAAQS. Virginia's August 25, 2011 SIP submittal met that requirement. In addition, section 110(a)(2)(C) specifically requires that state plans include a PSD and nonattainment NSR permit program as required in parts C and D of Title I of the Clean Air Act. The action being finalized today consistent with EPA's responsibilities under CAA section 110.

A second commenter submitted two substantive comments. First, the commenter raised concerns regarding EPA's determination that Virginia has met its obligations with respect to the visibility requirements of section 110(a)(2)(D)(i)(II) by virtue of its regional haze SIP. Second, the commenter raised several concerns about the legality of SILs and SMCs, as well as Virginia's adoption of them.

Comment 1: The commenter claimed that Virginia's regional haze SIP is insufficient to ensure

compliance with visibility requirements under CAA section 110(a)(2)(D)(i)(II). The commenter stated that Virginia's regional haze SIP only received limited approval due to its reliance on the Clean Air Interstate Rule (CAIR) for best available retrofit technology (BART) for electric generating units. The commenter alleged that EPA cannot rely on Virginia's regional haze SIP for satisfying section 110(a)(2)(D)(i)(ii) because it did not receive full approval, because CAIR has been remanded by the D.C. Circuit, and because EPA provided no explanation for how the regional haze SIP meets the requirements of section 110(a)(2)(D)(i)(II) as they relate to the 1997 ozone NAAQS, the 1997 and 2006 PM_{2.5} NAAQS, and the 2008 lead NAAQS. The commenter stated that EPA should either revoke its approval of the Virginia regional haze SIP or, at a minimum, provide an explanation for how the regional haze SIP ensures visibility will be protected for the aforementioned NAAQS.

Response 1: In the NPR for this rulemaking, EPA proposed to approve the following infrastructure SIP submittals as meeting the infrastructure requirements of section 110(a)(2)(D)(i)(II)(visibility protection): the November 13, 2007 Virginia submittal for the 1997 8-hour ozone and PM_{2.5} NAAQS; the December 13, 2007 Virginia submittal for the 1997 8-hour ozone NAAQS; the July 10, 2008 and September 2, 2008 Virginia submittals for the 1997 PM_{2.5} NAAQS; the April 1, 2011 Virginia submittal for the 2006 PM_{2.5} NAAQS; and, the March 9, 2012 Virginia SIP submittal for the 2008 lead NAAQS. The August 2012 NPR was not the first or the most recent proposed rulemaking issued by EPA relating to Virginia's compliance with the visibility requirements set forth in Section 110(a)(2)(D)(i)(II).

On June 13, 2012, EPA issued a final rule granting limited approval to the Virginia regional haze SIP (*See*, 77 FR 35287). In that final rulemaking action, EPA also approved Virginia's regional haze SIP as satisfying the infrastructure requirements of CAA sections 110(a)(2)(D)(i)(II) and

(J), as they relate to the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS. Subsequently, on September 24, 2013, when acting upon Virginia's infrastructure SIP for the 2008 lead NAAQS, EPA approved that SIP as meeting the infrastructure requirements of sections 110(a)(2)(D)(i)(II) and (J). (*See*, 78 FR 58462 (Sept. 24, 2013)). Most recently, EPA has proposed to approve Virginia's infrastructure SIPs for the 2008 ozone and 2010 NO₂ NAAQS as meeting the infrastructure requirements in sections 110(a)(2)(D)(i)(II) and (J) (*See*, 78 FR 39651 (July 2, 2013) (2008 ozone NAAQS) and 78 FR 47264 (August 5, 2013) (2010 NO₂ NAAQS)).

Therefore, as part of the August 2012 NPR for this rulemaking, EPA inadvertently proposed to approve Virginia's previously submitted infrastructure SIPs as meeting the infrastructure requirements of section 110(a)(2)(D)(i)(II) for the 1997 8-hour ozone NAAQS, and the 1997 and 2006 PM_{2.5} NAAQS. Since final action had been taken for this requirement during June 2012, further action was not required. As to EPA's approval of Virginia's compliance with the 110(a)(2) requirements for visibility (set forth in sections 110(a)(2)(D)(i)(II) and (J)) for the 2008 lead NAAQS, subsequent to the August 2012 NPR, EPA issued a final rulemaking on such requirements on September 24, 2013. Because EPA has already taken separate proposed and final rulemaking actions to approve these elements of the Virginia SIP, EPA is taking no further action on its proposed approval of the visibility requirements of section 110(a)(2)(D)(i)(II) as they relate to the aforementioned NAAQS.⁶ Additionally, EPA received and responded to similar comments as part of some or all of these previous rulemakings. Therefore, EPA is not responding to the comment that Virginia's regional haze SIP is insufficient to ensure compliance

⁶ EPA also notes there was an inadvertent, incorrect citation to its approval of the Virginia regional haze SIP in the NPR. The correct citation to EPA's approval of the Virginia regional haze SIP is 77 FR 35287 (June 13, 2012) (effective July 13, 2012).

with visibility requirements under CAA section 110(a)(2)(D)(i)(II), as we have already responded to similar comments in our other actions (*See*, 77 FR 35287; 78 FR 34970; 78 FR 39651; and 78 FR 47263). As a result, EPA sees no need for further action or response as part of this final rulemaking.

Comment 2: The same commenter argued that “Virginia’s regulations establishing SILs and SMCs are illegal under the CAA and should be disapproved by EPA” (*See*, Sierra Club Comments at 4). Here the commenter took issue with both EPA’s establishing SILs and SMCs generally, and with the PM_{2.5} SILs proposed by Virginia specifically. First, citing to the litigation in *Sierra Club v. EPA* (D.C. Circuit, No. 10-1413), the commenter asserts that EPA lacks the authority to establish SILs and SMCs because they improperly allow sources to avoid otherwise applicable CAA requirements. The commenter asserted that, therefore, EPA should disapprove those portions of Virginia’s SIP submittal pertaining to the PM_{2.5} SILs and SMCs, rather than approving the SMCs and taking no action on the SILs, as proposed.

Secondly, the commenter asserted that the specific SILs at 9VAC5-80-1715A and B should be disapproved because they do not provide VADEQ with sufficient discretion to require a cumulative impact analysis regardless of whether a source’s impact is below the SIL. In addition, the commenter asserts that the SIL values in paragraphs A(2) and B(1) of section 5-80-1715 are set at different levels and could lead to confusion. Moreover, the commenter asserted that the SIL values in paragraph 5-80-1715B(1) are not sufficiently protective of Class I areas because, unlike the SIL values in paragraph A, paragraph B does not distinguish different SIL values based on area classifications. Finally, the commenter asserts that the thresholds in paragraph 5-80-1715B(1) are improperly incorporated into Virginia’s SIP because they have as

their basis Appendix S of 40 CFR part 51, which applies in situations where EPA has not approved a state's preconstruction review program.

EPA Response 2: As previously discussed, in light of the D.C. Circuit's vacatur of 40 CFR 51.166(k)(2) and (i)(5)(i)(c), Virginia has officially withdrawn the corresponding state rules with which the commenter takes issue from the August 25, 2011 SIP submittal. Thus, there is no need to further consider the commenter's assertion that EPA should disapprove those provisions in this rulemaking because Virginia no longer asks that EPA consider them for approval as part of its SIP.

As to any apparent conflict between the two SIL provisions in Virginia's SIP submission, paragraph A(2) of 9VAC5-80-1715 has been withdrawn and thus the commenter's concern regarding any potential for confusion between the two provisions is addressed by withdrawal of one provision from the SIP submission.

As to the SILs in paragraph B(1), the commenter is incorrect in the claim that these SIL values were only intended to apply in states without an EPA-approved PSD program. While it is true that those SIL values are published in Appendix S of 40 CFR part 51, they are also published in section 51.165(b)(2). Section 51.165(b) implements section 110(a)(2)(D)(i) of the CAA and applies to sources or modifications locating in attainment or unclassifiable areas that would cause or contribute to a violation of any NAAQS in any area. This is the basis for their inclusion in Virginia's SIP. These SILs establish the threshold at or above which a new major stationary source or major modification will be considered to cause or contribute to a violation of an ambient air quality standard, and thus subject to the requirements in 40 CFR 51.165(b). EPA has recognized that the values in section 51.165(b)(2) may also be used in the PSD program to

support the demonstration required by 40 CFR 51.165(k)(1) and section 165(a)(3) of the CAA that proposed construction will not cause or contribute to a violation of the NAAQS. However, contrary to the commenter's assertion, the Federal regulations set forth at section 51.165(b) do not impede a permitting authority's discretion to require a cumulative impact analysis to make the showing required by section 51.166(k)(1) and section 165(a)(3) of the CAA where the source's impact is below a SIL value in section 51.165(b). Similarly, the corresponding state regulation at 9VAC5-80-1715B(1) does not impede the state's permitting authority discretion. Both provisions address the threshold above which a source will be considered to cause or contribute to a NAAQS violation. However, the provisions do not preclude a determination that a source may be considered to cause and contribute to a NAAQS violation even when the impact is below a SIL value set forth in 40 CFR 51.165(b)(2) which is utilized by the permitting authority. In fact, the court in *Sierra Club v. EPA* (705 F.3d 458, 469), declined to vacate the PM_{2.5} SIL value at section 51.165(b)(2) because the court explicitly found that, unlike section 51.166(k)(2), this provision does not improperly restrict permitting authorities' discretion (*See* 705 F.3d at 465-66). There is nothing in section 9VAC5-80-1715B(1) that would preclude VADEQ from imposing additional requirements on any sources necessary to show that a source does not cause or contribute to a NAAQS violation, including those sources impacting Class I areas. Therefore, except for the exceptions noted, EPA is finalizing the proposal to grant approval to Virginia's August 25, 2011 submittal.

IV. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) "privilege" for voluntary compliance evaluations performed by

a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . ." The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval."

Virginia's Immunity law, Va. Code Sec. 10.1-1199, provides that "[t]o the extent consistent with requirements imposed by Federal law," any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since "no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity." Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD and nonattainment NSR programs consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Final Action

EPA is approving Virginia's August 25, 2011 submittal as a revision to the Virginia SIP, with the exception of paragraph A(2) of 9VAC5-80-1715, and the portion of paragraph E(1) of 9VAC5-80-1695 pertaining to PM_{2.5} which were withdrawn by Virginia on February 13, 2013. EPA is finalizing a limited approval of the amendments to the nonattainment NSR regulations set

forth at 9VAC5-80-2010 (Definitions) and 9VAC5-80-2120 (Offsets). EPA is also approving the August 25, 2011 SIP submittal and the relevant portions of the above identified infrastructure SIP submittals which relate to the PSD requirements set forth in CAA sections 110(a)(2)(C), (D)(i)(II), and (J) for the 1997 PM_{2.5}, 2006 PM_{2.5}, and 2008 lead NAAQS. EPA is also approving the relevant portion of Virginia's infrastructure submittal relating to the PSD permit program pursuant to CAA section 110(a)(2)(D)(i)(II) for the 1997 ozone NAAQS. As previously discussed, EPA is not taking final action on its proposal to approve the portions of the Virginia infrastructure SIP submittals (which were identified in the NPR and are identified above) related to the visibility requirements of section 110(a)(2)(D)(i)(II) for the 1997 ozone, 1997 PM_{2.5}, 2006 PM_{2.5}, and 2008 lead NAAQS, because a final rulemaking action has previously been taken.

Additionally, on December 20, 2012 (77 FR 75380), EPA approved revisions to Articles 8 and 9 of 9VAC5, chapter 80. Neither that action nor the current action removes the pre-existing limited approval status of Virginia's PSD and nonattainment programs (*See*, Section III: General Information Pertaining to SIP Submittals from the Commonwealth of Virginia, 77 FR 75380-81, and Section IV, herein). However, the December 20, 2012 revisions to the table in paragraph 52.2420(c) inadvertently omitted reference to the limited approval status. In the interest of clarity, EPA is correcting that omission in this action. EPA is also adding a citation for the revised 9VAC5-80-1935 to the table in paragraph 52.2420(c). This revision was discussed in both the proposed and final rulemaking actions, but was inadvertently omitted from the table itself.

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable 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 CAA. 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 (Public Law 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 CAA; 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.

B. Submission to Congress and the Comptroller General

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).

C. Petitions for 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 appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. 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 pertaining to Virginia's PSD and nonattainment NSR programs 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 28, 2014

Shawn M. Garvin,
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for 40 CFR part 52 continues to read as follows:

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

Subpart VV—Virginia

2. In § 52.2420:

a. The table in paragraph (c) is amended by revising the entries for Sections 5-10-30, 5-80-1615, 5-80-1625, 5-80-1635, 5-80-1695, 5-80-1715, 5-80-1765, 5-80-1915, 5-80-1925, 5-80-1935, 5-80-1945, 5-80-1955, 5-80-1965, 5-80-2010, 5-80-2020, 5-80-2120, 5-80-2140, 5-80-2195, 5-80-2200, 5-80-2210, 5-80-2220, 5-80-2230, and 5-80-2240.

b. The table in paragraph (e) is amended by revising the entries for section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS, section 110(a)(2) Infrastructure Requirements for the 1997 PM_{2.5} NAAQS, section 110(a)(2) Infrastructure Requirements for the 2006 PM_{2.5} NAAQS, and adding section 110(a)(2) Infrastructure Requirements for the 2008 Lead NAAQS immediately following the previous entries.

The amendments read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * * *	* * *			
9VAC5,	General Definitions [Part I]			

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
Chapter 10				
* * * * *				
5-10-30	Abbreviations	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised.
* * * * *				
9VAC5, Chapter 80	Permits for Stationary Sources [Part VIII]			
* * * * *				
Article 8	Permits – Major Stationary Sources and Major Modifications Located in Prevention of Significant Deterioration Areas			
* * * * *				
5-80-1615	Definitions	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Limited approval remains in effect.
5-80-1625	General	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-1635	Ambient Air Increments	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Limited approval remains in effect.
* * * * *				
5-80-1695	Exemptions	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. The portion of paragraph E(1) that relates to PM _{2.5} is not in the SIP. Limited approval remains in effect.

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * * *				
5-80-1715 (Except paragraph A(2))	Source impact analysis	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Paragraph A(2) is not in the SIP. Limited approval remains in effect.
* * * * *				
5-80-1765	Sources affecting Federal class I areas – additional requirements	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Limited approval remains in effect.
* * * * *				
5-80-1915	Actions to combine permit terms and conditions	7/23/09	12/20/12, 77 FR 75380	New. Limited approval.
5-80-1925	Actions to change permits	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-1935	Administrative permit amendments	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-1945	Minor permit amendments	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-1955	Significant amendment procedures	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-1965	Reopening for cause	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
* * * * *				
Article 9	Permits - Major Stationary Sources and Major Modifications Located in Nonattainment Areas or the Ozone Transport Region			

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
5-80-2010	Definitions	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Limited approval of 9/1/06 and 8/17/11 amendments.
5-80-2020	General	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
* * * *	* * *			
5-80-2120	Offsets	8/17/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised. Limited approval of 9/1/06 and 8/17/11 amendments.
* * * *	* * *			
5-80-2140	Exemptions	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
* * * *	* * *			
5-80-2195	Actions to combine permit terms and conditions	7/23/09	12/20/12, 77 FR 75380	New. Limited approval.
5-80-2200	Actions to change permits	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-2210	Administrative permit amendments	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-2220	Minor permit amendments	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
5-80-2230	Significant amendment procedures	7/23/09	12/20/12, 77 FR	Revised. Limited approval remains in

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			75380	effect.
5-80-2240	Reopening for cause	7/23/09	12/20/12, 77 FR 75380	Revised. Limited approval remains in effect.
* * * * *	* * *			

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(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Section 110(a)(2) Infrastructure Requirements for the 1997 8-Hour Ozone NAAQS	Statewide	12/10/07, 12/13/07, 6/8/10, 6/9/10	10/11/11; 76 FR 62635	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		11/13/07, 12/13/07, 8/25/11	[Insert <u>Federal Register</u> page number where the document begins and date]	This action addresses the PSD related elements of the following CAA requirements: 110(a)(2)(D)(i) (II)
Section 110(a)(2) Infrastructure Requirements for the 1997 PM _{2.5} NAAQS	Statewide	7/10/08, 9/2/08, 6/8/10, 6/9/10, 4/1/08	10/11/11; 76 FR 62635	This action addresses the following CAA elements or portions

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
				thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		11/13/07, 7/10/08, 9/2/08, 8/25/11	[Insert <u>Federal Register</u> page number where the document begins and date]	This action addresses the PSD related elements of the following CAA requirements: 110(a)(2)(C), (D)(i)(II), and (J)
Section 110(a)(2) Infrastructure Requirements for the 2006 PM _{2.5} NAAQS	Statewide	8/30/10, 4/1/11	10/11/11; 76 FR 62635	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
		4/1/11, 8/25/11	[Insert <u>Federal Register</u> page number where the document begins and date]	This action addresses the PSD related elements of the following CAA requirements: 110(a)(2)(C), (D)(i)(II), and (J)
Section 110(a)(2) Infrastructure Requirements for the 2008 Lead NAAQS	Statewide	3/9/12	9/24/13, 78 FR 58462	This action addresses the following CAA elements or portions thereof: 110(a)(2)(A), (B), (C) (for

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
				enforcement and regulation of minor sources), (D)(i)(I), (D)(i)(II) (for the visibility protection portion), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M).
		8/25/11	[Insert <u>Federal Register</u> page number where the document begins and date]	This action addresses the PSD related elements of the following CAA requirements: 110(a)(2)(C), (D)(i)(II), and (J)
* * *	* * *	* * *	* * *	

[FR Doc. 2014-03640 Filed 02/24/2014 at 8:45 am; Publication Date: 02/25/2014]